REPORT

OF THE COMMISSIONERS

APPOINTED UNDER THE RESOLUTIONS OF MARCH 23, 1830,

RELATIVE TO A

REVISED CODE OF PENNSYLVANIA,

BEING

THE REVISION OF THE STATUTES RELATIVE TO

REGISTERS AND REGISTERS' COURTS,

AND

PROCEEDINGS IN THE ORPHANS' COURTS,

REQUIRED BY THE SIXTH OF SAID RESOLUTIONS.

READ IN HOUSE OF REPRESENTATIVES, FEB. 2, 1831.

HARRISBURG:

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1831.

REPORT, &c.

SIR—We have now the honour to transmit two bills prepared in pursuance of the resolution of the Legislature of the twenty-third of March last, with explanatory remarks relative to each.

Our anxiety to render these bills as perfect as possible, has occasioned more delay than we anticipated, but we cannot accuse ourselves of negligence or inattention, and we hope to stand excused in the mind of the legislature, from any thing like insensibility to the importance of the trust confided to us.

Presuming that the most regular channel of communication will be through your excellency to the two houses, we take the liberty of requesting that you will be pleased to transmit them on our behalf.

We have the honour to be,
With the greatest respect,
Your Excellency's most obedient
Humble servants,

W. RAWLE,
T. I. WHARTON,
JOEL JONES.

Philadelphia. January 31st, 1831.

To the Governor of Pennsylvania.

No. 1.

General Remarks

ON THE ACCOMPANYING BILLS.

To the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly, met:

In pursuance of certain resolutions adopted on the 23d of March last, the Governor of this Commonwealth having been pleased to appoint us, whose names are hereunto subscribed, Commissioners; "to revise, collate and digest, all such public acts and statutes of the Civil Code of this State, and all such British statutes in force in this State, as are general and permanent in their nature," we now respectfully submit to the Legislature this our first Report.

We take the liberty of premising, that the duties contemplated by those resolutions are felt by us to be of no common weight and difficulty, and that we have approached the performance of them

with a deep sense of our responsibility, but with a determination to devote our utmost ability and attention to the discharge of those duties in a manner satisfactory to our fellow citizens.

A very brief survey of the extent, and variety of the labours devolved upon us, will probably be sufficient to satisfy the Legislature, that we have not erred in our estimate of their arduous and important character.

The Civil code of Pennsylvania is composed, of the Common law, certain British Statutes, and the acts of assembly. With the first, we have no other concern in the present inquiry than as it bears upon the construction of the British Statutes, and the acts of assembly and is affected by them. The subject of the British Statutes is one of considerable difficulty—although the Report of the Judges of the Supreme Court, made in pursuance of a resolution of the Legislature, passed in the year 1807, has in a considerable measure determined the question respecting those in force in this state. That report however, although entitled to the utmost respect and deference, is not conclusive; nor was it intended so to be by its authors.

A more thorough examination, if the pressure of their official duties had permitted it, would have satisfied them, perhaps, that there are statutes in force, not included in their list, and that some of their suggestions as to the incorporation of other statutes into our code were deserving of re-consideration. We have found it necessary to examine for ourselves the whole body of the British Statutes, down to the period of our revolution; and to compare them with our own Legislation, to ascertain for ourselves how far they have been or continue to be in force in this commonwealth. We shall find greater difficulty in determining, which of those statutes ought to be incorporated into our code; and then in the process of incorporation, so as to render them harmonious in system and phraseology with our own legislation, without impairing their force and effect. In the words of the Judges of the Supreme Court in the report just alluded to "this part of our task though very honorable is very arduous, and in executing it, we have thought ourselves bound to proceed with great caution." To "re-enact the substance of these statutes in language suitable to our present condition would be a work of labor. Something of the kind has been done in the States of Virginia and New York, but it is believed that several years were employed in the performance."

The acts of assembly of this commonwealth are the accretions of nearly a century and a half. During that period the government has undergone one signal revolution and various changes have taken place in the habits, opinions and even structure of the community. More than six thousand six hundred acts have been adopted by the Legislature since the commencement of the eighteenth century, which must be separately examined and studied for the purpose of ascertaining, whether they are private or public, local or general, temporary or permanent, repealed, altered or in force. No revision of the statute Laws of Pennsylvania has taken place since the year

1700. In this respect our commonwealth is much behind most of her sisters of the union. In many of the states, the statute book has been revised since the revolution; in some more than once. Where this process takes place periodically, it is obvious that the task is comparatively light; but where, as in the present case, it becomes necessary to go back almost to the foundation of the province, the labor and difficulty are increased vastly beyond the numerical proportion of the acts to be considered. Without dwelling on the variation of language which, in the course of a century and a half, must be perceived in the laws as well as in the literature of a people, we may observe that great difficulty may be experienced in deciding whether statutes have become obsolete by change of circumstances and manners; whether others are repealed by implication arising from the phraseology of subsequent statutes or by constant and uninterrupted practice to the contrary. To adapt the language of the enactments to the understanding of the present day without losing any of the phraseology which may have acquired a settled and determinate meaning by the adjudication of the courts; to digest and organize into a system the multiplied and often inconsistent provisions to be found in our statute book, is a task, we repeat, which it is impossible to enter upon without a profound conviction of its arduous and responsible character.

If our duties ended here, however, we should feel less anxiety for their result, than, looking at their actual scope and extent, it is natural for us to entertain: because, acting, as we have determined to do upon the principle of retaining every thing in the existing body of laws about which there could be any question, we could hardly expect dissatisfaction in any quarter. But, we are required by the resolutions of the Legislature in addition to the task of revision "to suggest such contradictions, omissions and imperfections as may appear in the statutes to be revised and the mode in which the same may be reconciled, supplied or amended; to designate such acts or parts of acts which ought to be repealed and recommend the passage of such new acts or parts of acts as such repeal may render necessary," and "to report whether it would be expedient to introduce any, and if any, what change in the forms and mode of proceeding in the administration of the laws."

In the performance of this latter branch of our duty we shall have to encounter difficulties of a more serious character, which are greatly increased in amount and importance by the circumstance we have already alluded to, of this being the first attempted revision of the laws since the commencement of the last century. If we rightly construe the last clause of the second resolution it devolves upon us the duty of reporting such new acts or parts of acts as may, in our opinion, be necessary to complete the integrity and harmony of the system; and adapt it to the opinions and character of the present times: And with reference to the administration of justice the intention of the Legislature is distinctly and explicitly stated.

It is obvious that these resolutions open a very wide field of in-

quiry; and although we are very far from being satisfied of the expediency of entire and sudden changes in jurisprudence, and averse to hasty experiments in legislation, we are not less clearly convinced that our code, both of the statute and unwritten law, requires some material alterations, and, at all events, that considerable benefit will accrue to our commonwealth, from a full and candid examination of the various suggestions which have been made for its reform. The present age is distinguished for its efforts at improvement in most of the sciences and pursuits which concern the interests of mankind. In Europe, as well as in many parts of our own country, public opinion seems to be earnestly directed to the melioration of the laws, and the improvement of their administration. It is especially remarkable that in England, where an adherence to established doctrines and forms is almost a national feature, the spirit of reform appears to be at work, and promises the best results for its jurisprudence. No fewer than three commissions have been appointed in pursuance of resolutions of the British parliament; one, namely, on the subject of the court of chancery; one on the laws relating to real estate; and one on the subject of the administration of justice; each of which has made report in part, containing some valuable and important suggestions. In a neighbouring state to our own, an entire revision of the statute laws has recently taken place, and many essential alterations have been introduced. It is true that many of the reforms now suggested in England and New York, were long since introduced into this state, and have produced signal advantages for our community, but there are many others, of an equally important character, proposed by the British commissioners, which deserve serious consideration here, because equally applicable to our own system. We are not prepared at this moment to say to what extent we shall think it our duty to recommend to the legislature the adoption of improvements suggested in the quarters to which we have alluded, but we believe that public opinion in our commonwealth is favourable to some material "changes in the forms and modes of proceeding in the administration of the laws."

Having thus very briefly presented our view of the extent and variety of our general duties, and reserving for a future report a more detailed statement of our ideas upon the subjects embraced in them, we proceed to submit to the legislature a few general remarks upon the bills, which, in conformity with the sixth resolution adopted on the 23d of March last, we have prepared for the present session of the assembly.

The resolution adverted to, requires us "to revise the several statutes relative to the setlement of accounts before Registers, and proceedings in the Orphans' Court, as soon as conveniently may be, and report the same for the determination of the General Assembly, at their next session?"

The bills now presented are,

1st. "A bill relating to Registers and Registers' Courts."

2d. "A bill relating to Orphans' Courts."

1. The bill relating to Registers and Registers' Courts, is designed to comprise all the provisions of the different acts of assembly relating to the qualification, liability, duty, jurisdiction, power, process and practice of Registers and Register's Courts, together with such new provisions as it was thought expedient to recommend. It is divided into forty-nine sections, and is derived from nearly twenty different acts of assembly and statutes.

It will be perceived that in relation to this bill, we have gone somewhat beyond the duty exacted of us by the legislature on the present occasion. It appeared to us on examining the acts of assembly relating to the settlement of accounts before Registers, that these proceedings were so intimately connected with the other subjects of the jurisdiction of that officer, and that the whole scheme of his jurisdiction was so closely allied with that of the Register's Court, that it would consist best with that uniformity and system which are the declared objects of the legislature, if we brought together all the enactments to be found in our statute book, relating to both the Register and the Register's Court, and moulded them into one bill, arranged with due regard to the distinctness of their several functions. We persuade ourselves that the plan we have adopted in respect to this bill will not be unsatisfactory to the legislature.

2. The bill relating to the Orphans' Court has occupied a large share of our time and reflections. The peculiar structure of that court, its extensive but ill-defined sphere of jurisdiction, the magnitude of the interest upon which it operates, the uncertainty of the code of law by which it is regulated, and its equally uncertain and insufficient practice and process, serve to surround with difficulties every attempt to frame a regular system for it: So convinced are we of the arduousness of the task of compiling a complete system, which shall embrace the constitution, jurisdiction, powers, and practice, of this court, that had it not been for the express directions of the legislature to report upon it at the present session, we should probably have reserved this subject to the last, and given it the utmost deliberation that our limits allowed. Of the necessity however of an early as well as thorough examination and revision of the acts of assembly relating to this tribunal, we are fully convinced. "Nothing," said the late Judge Duncan, in the case of *M'Pherson* v. *Cunliffe*, 11 *Serg. & Rawle*, 432, "so much requires legislative attention as the proceedings in the Orphans' Courts; for as sure as we descend into our graves, so sure into this court we must come; and the man would be a real public benefactor, who would devise set forms, and furnish directions in conducting the vast business in these courts, where we every day find so deplorable a system of confusion."

The Orphan's Courts of Pennsylvania bear a close resemblance to the courts of Chancery in England and in some of these United States, in respect to the subjects of their jurisdiction, while at the same time they are lamentably deficient in the powers and process

by which those courts are enabled to do complete and exact justice towards their suitors. The mode of commencing proceedings, for example, is similar in both tribunals: in the Orphans' Court, namely, by petition, which resembles the bill in chancery, and seems like that to require a substantial answer. In the Courts of Chancery, however, an answer may be required on oath or affirmation upon all the subjects relative to the controversy, which the complainant may propound in his bill. And thus the defendant may be compelled to furnish information often of the utmost importance to the ends of justice. If the Orphans' Court possesses this power, and the analogous one of compelling the production of books and papers material to the issue, which has been conferred by the Legislature upon the courts of common law, their existence has been generally doubted, and the exercise of them is believed to have rarely taken place. Various other defects exist upon which we shall not enter at present, as they will form the subject of particular remark in the comments with which we propose to accompany the several sections of the bill.

In order to obtain information respecting the practice of the Orphans' Courts throughout the state and the views entertained of the defects in their jurisdiction and powers we addressed letters to the Judges of the Supreme Court, to the Presidents of the several Courts of Common Pleas and District Courts, and to some other persons of learning and experience, requesting their opinions on these subjects. We have received answers from many, to whom we are indebted for some valuable information and suggestions, of which we have availed ourselves in the accompanying bills.

In regard to the subjects embraced in the two bills we may be allowed a few more remarks. In the performance of this branch of our duties we have adopted a rule which we propose to pursue in the progress of our remaining labours, and the propriety of which is perhaps too obvious to need any comment, namely, to separate into distinct acts all subjects of legislation which are in their character distinct. We believe it to be the desire of the Legislature to possess not only a revised and consolidated code of statute law, but one systematized as to subject matter and arranged into regular and appropriate titles, each of which shall contain all that naturally belongs to it and no more; and we consider almost any labour well bestowed that facilitates a convenient reference to and easy acquisition of a knowledge of the laws by the whole body of our citizens.—Thus, in the Bill relating to Orphans' Courts we have studiously confined ourselves to what we conceive to be the appropriate subjects of its enactment, viz:

1. The Constitution of the Court or the designation of the individuals who compose it.
2. Its Jurisdiction.
3. Its Powers, and
4. Its practice or manner of exercising its powers upon the objects of its jurisdiction, so far as it is a subject of legislative provision.

Under this impression of the proper arrangement of subjects, we have excluded from this bill, all those passages of the laws which relate to the division of the estates of intestates, except so far as the Orphans' Court is concerned in the actual partition or sale of such estates. So with respect to the laws defining the duties and powers of executors and administrators, in respect to the payment of debts and other subjects. It will be perceived, that certain other provisions of the existing laws, relative to executors and administrators, are omitted in the bill relating to Orphans' Courts, although, usually classed under the same head in the digests and indexes of the acts of Assembly, as we conceive, that they are more properly to be introduced into the bill relating to executors and administrators. When the whole body of our statute law comes to be presented to the legislature, the advantages of the systematic arrangement, we have spoken of, will, we trust, be found apparent. It was our intention, if time should allow, to submit together with the bills now reported, other bills under appropriate titles, showing our distribution of all those acts of Assembly which are frequently referred to, as a part of the system of law relating to the Orphans' Court. Such a course would be essential to the full developement of our views of arrangement. As however, it has been found impracticable, we must refer to the preceding observations as explanatory, of what might otherwise seem omissions. The bill contains, we believe, all the existing provisions of the law relative to that court as a tribunal, and may be made operative to enforce the duties of the subjects of its jurisdiction, however they may be diversified.

It will be perceived also, that the phraseology of the existing acts is generally retained in the bills now submitted. We have endeavoured, in this respect, to comply with the injunction of the legislature, namely: to make no change in the language of the acts, "by which their true intent and meaning, shall be in anywise impaired, altered or affected, except in those instances in which it shall be expressly intended and proposed, to amend or change the existing provisions of such statutes." Fully aware of the importance of certainty and stability in the interpretation of the laws, we have in all cases retained forms of expression, which have received a judicial construction, and unless when the object was "to amend or change the existing provisions," we have no further altered the text, than to "divest it of redundant phrases and useless verbiage." In this description, we consider the terms indicating the difference of sex and number, in the specification of the objects of legislative provisions. The repetition of the words *he, she or they, executor and executors,* and the like has produced much of that inconvenient prolixity which is objected to, in the statute laws of most countries. In some of those which have recently undergone revision, an example has been set, which we have followed in these bills, and which we propose to pursue in future, namely: to use the words indicating the singular number, and the masculine gender, in all cases, except where it may be intended

otherwise, especially to provide. We have not thought it necessary to introduce a section providing especially that such words shall be taken to include the plural, and females as well as males, because we suppose, that phraseology of this description may be safely left to the exposition of the the courts, in all acts not penal in their operation.

In the consolidation into one of many statutes passed at different periods of time, some with preambles reciting defects or inconveniences which it is no longer important to mention, and some premising and adverting to sections of a preceding law, considerable omissions and some alterations must necessarily take place. We are confident, however, that in the present Bills no omission or alteration has occurred by which the design of the acts consolidated is at all affected.

In the phraseology of the new sections suggested for the consideration of the Legislature, we have studied conciseness; but, aware of the superior importance of plainness and perspicuity we have preferred expressing the design and scope of the enactment in two or more sections to compressing them within one at the risk of indistinctness of expression and obscurity of purpose.

It is possible that we may have overlooked some provisions of the existing laws relating to the Orphans' Court which ought to be incorporated with this Bill. We have taken great pains, however, to avoid this defect by as careful examination and collation of all the acts connected with the subject as our limited time would permit. When we come to lay before the Legislature the general body of the revised laws we shall have an opportunity of reporting such additions to the Bills now prepared as may possibly have been omitted and may be necessary to complete the system.

W. RAWLE,
T. I. WHARTON,
JOEL JONES.

Philadelphia, January 31, 1831.

No. 2.

A Bill

RELATING TO REGISTERS AND REGISTERS' COURTS.

An Act relating to Registers and Registers' Courts.

It is enacted by the Senate and House of Representatives of the commonwealth of Pennsylvania, in General Assembly met, as follows:

SECTION I. Every person who shall be appointed to the office of register, before he shall enter upon the duties of the office, shall make oath or affirmation to support the constitution of the United States, and the constitution of this commonwealth, and to perform the duties of the office of register with fidelity; and shall also, with one or more sureties, to be approved of by any two judges of the Common Pleas of the respective county, and also by the Governor, give a joint and several bond to the commonwealth, in a sum equal to half the sum prescribed by law for the official bond of the sheriff for the time being of the same county; with condition faithfully to execute the duties of his said office, and well and truly to account for, and pay according to law all monies received by him for the use of the commonwealth, and to deliver up the books, seal, records and other writings belonging to his said office, whole, safe, and undefaced, to his successor in office: which said bond shall be for the use of all persons concerned, and for the relief of all who may be aggrieved by the acts or neglect of such register.

II. Every person appointed as aforesaid, shall cause the bond hereinbefore prescribed, being duly acknowledged by him and his sureties before a magistrate of the city or county respectively, to be recorded by the recorder of deeds of the respective county, and as soon afterwards as convenient, to be transmitted into the office of the Secretary of the Commonwealth for custody; of which transmission he shall be entitled to receive the secretary's certificate without fee or reward.

III. Copies of the record of the official bond of any register, acknowledged and recorded as aforesaid, and duly certified by the recorder of deeds for the time being, shall be good evidence in any action brought against him or his sureties on such bond, according to its form and effect, in the same manner as the original would be, if produced and offered in evidence.

IV. Every register shall appoint and keep a deputy to officiate in his absence, for whose conduct he and his sureties shall be accountable; and such deputy shall be capable in law to take the probate of wills and testaments, and to grant letters of administration and of collection, and to do whatever else by law appertains to the office of register.

V. Every register, qualified to act as aforesaid, shall have jurisdiction within the county for which he shall have been appointed, of the probate of wills and testaments, of the granting of letters testamentary and of administration and of collection, of the passing and filing of the accounts of executors, administrators, collectors and guardians, and of any other matter, whereof the jurisdiction may be at any time expressly annexed to his said office: and the act of any register in any matter, whereof another register has the exclusive jurisdiction, shall be void and of no effect.

VI. Letters testamentary and of administration and of collection shall be grantable only by the register of the county within which was the family or principal residence of the decedent, at the time of his decease; and if the decedent had no such residence in this commonwealth, then by the register of the county where the principal part of the goods and estate of such decedent shall be. And no letters testamentary, or of administration or otherwise purporting to authorise any person to intermeddle with the estate of a decedent, which may be granted out of this commonwealth, shall confer upon such person any of the powers and authorities possessed by an executor or administrator or collector, under letters granted within this state.

VII. The register having jurisdiction as aforesaid, shall, at the instance of any person interested, issue a citation to any person having the possession or control of a testamentary writing, alleged to be the last will or testament of a decedent, requiring him to produce and deposite the same in his office for probate; and if such person shall conceal or withhold such writing during the space of fifteen days after being personally served with a citation issued in the manner and form aforesaid, he shall be liable to an indictment as for a misdemeanor, or to an action for damages by the person aggrieved.

VIII. Whenever any testamentary writing shall be offered for probate before any register having jurisdiction thereof, such register shall have power to issue a citation to any person whose name may be subscribed thereto as a witness, or who may be alleged to him to be otherwise capable of proving the due execution of such testamentary writing—such person being within the proper county or within forty miles of the office of such register—commanding him, under a penalty of three hundred dollars, to appear before him at the office of the register of the county, on a day certain, not less than five days from the service of such citation, and depose and testify what he may know concerning the execution of such writing; and if such person, being cited and summoned as aforesaid, shall refuse or neglect to appear as commanded, the register shall have power to issue an attachment against such witness, to compel his appearance; or the party aggrieved may have an action against him to recover the said penalty, in the manner now allowable by law in cases of subpœnas, issued to witnesses by the courts of common law.

IX. On the application of any person interested, every register shall have power to issue commissions to take the depositions of witnesses, in other counties or states or foreign countries, in all cases within his jurisdiction upon interrogatories filed in his office.

X. No letters testamentary upon any last will and testament, or of administration with a will annexed, shall pass the seal of the registers' office until five days after the day of the death of the decedent be fully expired; and no nuncupative will shall be admitted to probate, nor shall letters testamentary thereon be issued till fourteen days after the day of the death of the decedent be fully expired; nor shall any nuncupative will at any time be admitted to probate unless process have first issued to call in the widow, if any, and such of his relations or next of kin as would be entitled to the administration of his estate in case of intestacy, to contest the same if they please.

XI. No testimony shall be received to prove any nuncupative will after six months elapsed from the speaking of the pretended testamentary words, unless the said testimony or the substance thereof, were committed to writing within six days after the making of such will.

XII. Copies of wills and testaments, proved in any other state or country according to the laws thereof, and duly authenticated, may be offered for probate before any register having jurisdiction, and proceedings thereon may be had with the same effect, so far as respects the granting of letters testamentary or of administration with the will annexed, as upon the originals: and if the executor or other person producing any such copy, shall produce also therewith, a copy of the record of the proceedings for the probate of the original thereof, and of the letters testamentary or other authority to administer issued thereon, attested by the person having power to receive the probate of such original in the place where it was proved, with the seal of office, if there be one, annexed, together with the certificate of the chief judge or presiding magistrate of the state, country, county, or district, where such original was proved, that the same appears to have been duly proved, and to be of force, and that the attestation is in due form—such copies and proceedings shall be deemed sufficient proof, unless the contrary be shown, for the granting of letters testamentary or of administration with the will annexed, as the case may require, without the production or examination of the witnesses attesting such will.

XIII. Whenever a caveat shall be entered against the admission of any testamentary writing to probate, and the person entering the same, shall allege as the ground thereof, any matter of fact touching the validity of such writing, it shall be lawful for the register, at the request of any person interested, to issue a precept to the Court of Common Pleas of the respective county, directing an issue to be formed upon the said fact or facts; and also, upon such others as may be lawfully objected to the said writing, in the following form, viz:

COUNTY, ss.

The Commonwealth of Pennsylvania

L. S. To the judges of the Court of Common Pleas of the said county, greeting:

Whereas, A. B. on the day of in the year, &c.—presented to G. H., our register of wills of said county, for probate a certain writing hereto annexed, purporting to have been made the day of in the year, &c.—*(or otherwise describing the paper in question)* which said writing, the said A. B. avers is the last will and testament of the said C. D ; and whereas. E. D., who is a son and heir of the said C. D. *(or intermarried with F. D. who is a daughter and heir, &c. according to the fact,)* hath objected before our said register, that *(the said writing was procured by duress and constraint. stating the matters of fact objected;)* and whereas, the said A. B. *(or E. D.)* hath requested that an issue may be directed into our said court, to try by a jury, the validity of the said writing and the matters of fact which may be objected thereto in our said court; therefore, we command you that you cause an action to be entered upon the records of our said court, as of the day of the delivery of this our precept into the office of the prothonotary of our said court, between the said A. B. and the said E. D., so that an issue therein may be formed upon the merits of the controversy between the said parties, and tried in due course according to the practice of our said court in actions commenced by writ; and further, that you cause all other persons who may be interested in the estate of the said C. D. as heirs, relations or next of kin, devisees, legatees or executors, to be warned, so that they may come into our said court and become party to the said action if they shall see cause; and that you certify the result of the trial so had, in the premises, into the office of our said register.

Attest—G. H., register of wills of the said county.

And the facts established by the trial had and certified to the register as aforesaid, shall not be re-examined by the said register, nor upon any appeal from his decision.

XIV. Before any register shall issue any letters testamentary or of administration, with the will annexed, he shall administer an oath or affirmation to the person and persons receiving the same, in the following form, viz:

You do &c. that this writing contains the last will and testament of A. B. named therein as far as you know, and as you verily believe; that you will well and truly perform the same, by paying first the debts, and then the legacies contained in the said will according to law; that you will diligently and faithfully regard, and well and truly comply with the provisions of the law relating to collateral inheritances; that you will make a true and perfect inventory of all the goods, chattels, and credits of the deceased, as far as you know and can ascertain them, and exhibit the same into this office, within forty days from this day, and also a just account and settlement thereof, in one year or when thereunto legally re-

quired: *Provided*, that in the case of the will of a decedent, not resident at the time of his decease within this commonwealth, proved in another state or in a foreign country, whereof letters testamentary or of administration with the will annexed, may be granted in this state; it shall be lawful for the register so to modify the foregoing oath, that the inventory and account therein mentioned shall be of the goods, chattels, and credits of the deceased, within this commonwealth.

XV. Before the register shall issue letters testamentary to any executor, not being an inhabitant of this commonwealth, he shall take from him a bond with two or more sufficient sureties, being inhabitants of this commonwealth, respect being had to the value of the estate to be administered, in the name of the commonwealth, with the following condition, viz:

The condition of this obligation is; that if the said A. B. executor of the last will and testament of C. D. deceased, shall make a true and perfect inventory of all and singular, the goods, chattels, and credits of the said deceased, being within this commonwealth, which have come or shall come to his hands, possession or knowledge, or into the hands and possession of any other person, for him and the same so made, do exhibit into the office of the register of the county of within forty days from the date hereof, and the same goods do well and truly administer according to law, and make a just and true account, of all his actings and doings therein, in one year from the date hereof, or when thereunto lawfully required, and shall well and truly comply with the laws of this commonwealth, relating to collateral inheritances, and in all other respects with the laws of this commonwealth, relating to his duty as executor; then this obligation to be void, otherwise of force and effect.

XVI. All original wills after probate, and the copies of all original wills produced under the provisions of this act, shall be recorded and filed by the register of the respective county; and shall remain in his office, except when required to be had before some higher tribunal by certiorari or otherwise; and if removed for such cause they shall be returned in due course to the office where they belong: and the copies of all such and of the probates thereof, under the public seals of the courts or offices, where the same may have been or shall be so taken or granted respectively, except copies or probates of such wills and testaments as shall appear to be annulled, disproved or revoked, shall be adjudged and are hereby enacted to be, matter of record and good evidence to prove the gift or devise thereby made.

XVII. Whenever the executors named in any last will and testament shall all refuse or renounce the trust and execution thereof, the register, having jurisdiction as aforesaid, may receive the probate of such will, and grant letters of administration with it annexed to the person by law entitled thereto.

XVIII. Whenever a sole executor, or the survivor of several executors shall die, leaving goods or estate of his testator un-

administered; the register having jurisdiction shall, notwithstanding such executor may have made his last will and testament and appointed an executor or executors thereof, grant letters of administration of all such goods and estate, in the same manner as if such executor had died without having made any testament or last will: and the executor of such deceased executor shall in no case be deemed executor of the first testator.

XIX. In all cases where the administration of the estate of any decedent shall become vacant by reason of any decree of the Orphans' Court, the register having jurisdiction shall, on being certified thereof under the seal of the said court, grant new letters in such form as the case shall require to the person or persons by law entitled thereto.

XX. No letters of administration shall, in any case, be granted upon the estate of any intestate until the expiration of five days from the day of his decease; nor shall any such letters be originally granted upon the estate of any decedent after the expiration of twenty-one years from the day of his decease; except on the order of the Registers' Court upon due cause shewn.

XXI. Whenever letters of administration are by law necessary, the register having jurisdiction shall grant them, in such form as the case shall require, to the widow, if any, of the decedent or to such of his relations or kindred as by law may be entitled to the residue of his personal estate, or to a share or shares therein after the payment of his debts; or he may join with the widow in the administration, such relations or kindred, or such one or more of them as he shall judge will best administer the estate; preferring always of those so entitled, such as are in the nearest degree of consanguinity with the decedent; and also, preferring males to females: and in case of the refusal or incompetency of every such person, to one or more of the principal creditors of the decedent applying therefor, or to any fit person at his discretion: *Provided*, that if such decedent were a married woman, her husband shall be entitled to the administration, in preference to all other persons: *And provided further*, that in all cases of administration with a will annexed, where there is a general residue of the estate bequeathed, the right to administer shall belong to those having the right to such residue; and the administration in such cases, shall be granted by the register to such one or more of them as he shall judge will best administer the estate.

XXII. Whenever all the executors named in any last will and testament, or all the persons entitled as kindred to the administration of any decedent's estate; shall happen to be minors or under the age of twenty-one years, the guardians of such persons shall be entitled to demand in their right the administration of such decedent's estate during the minority of their wards; subject nevertheless to be terminated at the instance of any of the said wards who shall have arrived at the full age of twenty-one years; and if such guardians shall refuse the administration; or if such minors shall have no guardians, it shall be lawful for the register

to grant administration as aforesaid to any fit person or persons at his discretion.

XXIII. It shall be the duty of every register upon his granting any letters of administration of the goods and chattels of any person dying intestate, to take a bond or bonds from the person or persons receiving such letters, with two or more sufficient sureties, respect being had to the value of the estate, in the name of the commonwealth, with condition in the following form, viz:

The condition of this obligation is; That if the above bounden A. B. administrator of all and singular the goods, chattels and credits of C. D. deceased, do make or cause to be made a true and perfect inventory of all and singular the goods, chattels and credits, of the said deceased, which have come or shall come to the hands, possession or knowledge of him the said A. B. or into the hands and possession of any other person or persons for him; and the same so made do exhibit or cause to be exhibited into the register's office in the county of within forty days from the date hereof; and the same goods, chattels and credits and all other the goods, chattels and credits of the said deceased at the time of his death, which at any time after shall come to the hands or possession of the said A. B. or into the hands and possession of any other person or persons for him, do well and truly administer according to law; and further, do make or cause to be made a true and just account of his said administration within one year from the date hereof, and all the rest and residue of the said goods, chattels and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed by the Orphans' Court of the county, having jurisdiction, shall deliver and pay unto such person or persons as the said Orphans' Court, by their decree or sentence pursuant to law, shall limit and appoint; and shall well and truly comply with the laws of this commonwealth, relating to collateral inheritances; and if it shall hereafter appear that any last will and testament was made by the said deceased, and the same shall be proved according to law; if the said A. B. being thereunto required, do surrender the said letters of administration into the register's office aforesaid; then this obligation to be void, otherwise to remain in full force.

Provided, That in every case of special administration, the form of the foregoing condition shall be modified so as to suit the circumstances of such case.

XXIV. And before issuing any letters of administration upon the estate of any person dying intestate, the register shall administer to the person and persons receiving the same an oath or affirmation in the following form, viz:

You do, &c. that C. D. deceased, died without any testament or last will as far as you know and as you verily believe; that you will well and truly administer all and singular the goods, chattels, rights and credits of the said deceased, and pay his debts as far as his goods, chattels and credits will extend and the law will require you; that you will diligently and faithfully regard,

and well and truly comply with the laws of this commonwealth, relating to collateral inheritances; that you will make a true and perfect inventory of all the said goods, chattels and credits, as far as you can ascertain them, and exhibit the same into this office within forty days from this day, and of all others which you may afterwards discover as soon as conveniently may be; and also a just account and settlement thereof in one year, or when thereunto legally required. So &c.

XXV. When objections are made or a caveat is entered against the probate of any last will and testament and no precept for an issue is directed by the register into the Common Pleas as aforesaid; or when objections are made to the granting of letters of administration to any person applying therefor; or when any question of kindred or other disputable and difficult matter comes into controversy before any register, he shall, at the request of any person interested, appoint a Register's Court for the decision thereof, to be held at a time certain, and as soon as convenient, at the court house or other public place in the respective county, giving convenient notice of the time and place of holding the same, by citation or otherwise to all concerned, as well to the persons interested as to the judges whose assistance he shall require; and in the mean time, he shall do and receive all proper acts preparatory to the business of such court.

XXVI. In all cases of delay in the granting of letters testamentary or of administration, by reason of the absence or negligence of those having the right thereto, or for any other cause; also in all cases where the safety of the estate of a decedent, shall require the interposition of the register before the administration thereof can lawfully or conveniently be granted in due course, it shall be lawful for the register, having jurisdiction as aforesaid, to issue to any fit person or persons letters for the collection and preservation of the goods and personal estate of such decedent; and for the sale of such portions thereof as may be perishable or chargeable, or which may become of less value by keeping; subject to be revoked upon the granting of letters testamentary, or of administration of such estate.

Provided nevertheless, That no revocation of any letters of collection shall prejudice or abate any suit or other proceeding which may have been commenced by authority of such letters, but the same may be proceeded in, and perfected by the executor or administrator.

XXVII. The form of letters of collection shall be as follows:

COUNTY, ss.

The Commonwealth of Pennsylvania

L. S. To all persons to whom these presents shall come, greeting:

Know ye that C. D. late of the county of aforesaid, had, as it is said, at the time of his decease, personal property whereof the administration cannot be immediately granted, but which if

care be not taken thereof, may be lost or destroyed or become of less value; to the end therefore, that the same may be preserved for those who shall appear to have a legal right or interest therein, we do hereby authorise and depute A. B of *farmer*, (*and E. F. of merchant*) to collect and secure the said property, wheresoever, within this commonwealth the same may be, whether it be goods, chattels, rights or credits, in all respects proceeding herein according to law.

Attest, G. H. register of said county the day of A. D.

XXVIII. All letters of collection, granted in the manner and form aforesaid, shall be construed to confer upon the persons thereby deputed, full power to collect the goods, chattels and personal estate of the decedent, and to secure and preserve the same at a reasonable expense; and immediately after appraisement, to sell such portions thereof, as may be perishable or chargeable or not to be preserved without prejudice; and to sue out and prosecute all necessary writs and process, for the recovery of debts or other personal demands and for the revival of judgments and other liens belonging to the estate; and to do whatever else may be necessary to preserve undiminished, the personal estate of the decedent: But no such letters shall confer upon the persons thereby deputed, any authority to intermeddle with the real estate of the decedent, nor impose upon them any liability to be sued as the representatives of such decedent; or to answer to any demand by action against such decedent or his estate whatsoever.

XXIX. Every register shall, upon his granting any letters of collection as aforesaid, take a joint and several bond or bonds from the person and persons receiving the same, with two or more sureties, respect being had to the value of the estate, in the name of the commonwealth, with a condition in the following form, viz:

"The condition of this obligation is, that if the above bounden A. B. collector of the goods, chattels and credits of C. D. deceased, do make or cause to be made a true and perfect inventory of all and singular the goods, chattels and credits of the said C. D. at the time of his decease, which have come or shall come to the hands, possession or knowledge of him the said A. B. or into the hands and possession of any other person or persons for him; and the same do exhibit or cause to be exhibited into the office of the register of the county of within forty days from the date hereof; and the same do well and faithfully collect and preserve, according to the tenor and effect of the letters of collection now granted to him; and shall deliver over on the requisition of the register of said county, to the person and persons who shall, at any time hereafter, be duly authorised by letters testamentary or of administration to receive them, all the said goods, chattels, credits and the proceeds thereof, except such as shall be lawfully disposed of, and allowed by the Orphans' Court having jurisdiction; and further shall make a true and just account of all his actings and doings, in the premises within one year from the date hereof, and within thirty days after the termination of his office, and duty as

collector, duly notified to him as aforesaid, and when thereunto lawfully required, then this obligation to be void otherwise of force and effect.

XXX. And before issuing any letters of collection as aforesaid, the register shall administer an oath or affirmation in the following form, viz:

You do &c. that you will well and truly discharge the duties of the office of collector of all and singular the goods, chattels and credits of C. D. deceased, according to the tenor and effect of the letters now granted to you; that you will make a true and perfect inventory of all the said goods, chattels and credits, so far as you can ascertain them, and exhibit the same into this office, within forty days from this day, and of all others, you may afterwards discover, as soon as conveniently may be, and also that you will make a just account of all your actings and doings, in the collection and preservation of the estate of the said C. D. when thereunto lawfully required. So, &c.

XXXI. Every register shall, upon his granting any letters testamentary or of administration or of collection, issue under the seal of his office, a warrant directed to two discreet persons not related to the executor, administrator or collector, nor to the decedent, nor in any way interested in his estate, or the administration thereof, selecting them from the neighbourhood where such decedent lived, if his place of residence was within the county, and if such can there be found, to appraise the goods, chattels and credits of the decedent, made known to them, or shown to them by the executor, administrator or collector, in the form following, viz:

COUNTY, SS.

****
L.S.
****

The Commonwealth of Pennsylvania, to J. S. and T. S. Greeting:

These are to authorize you, jointly to appraise the goods, chattels and credits of C. D. late of *farmer*, deceased: each of you having first made oath or affirmation before some person having authority to administer the same, in the form hereon endorsed, a certificate whereof you are to return to our register of the county aforesaid, together with an inventory of the goods, chattels and credits of the said C. D. which by you shall be appraised, with the value of the items thereof, as you shall arrange and parcel the said estate, set opposite to each respectively.

Attest. G. H. register of the said county, this day of A. D.

XXXII. The register issuing any such warrant shall endorse or cause to be endorsed thereon, an oath or affirmation in the following form, viz:

I, J. S. &c. that I will well and truly, and without prejudice or partiality value and appraise the goods, chattels and credits of C. D. late of *farmer*, deceased, so far as they shall

come to my sight or knowledge, and will in all respects perform my duty of appraiser to the best of my skill and judgment.

XXXIII. In case of the death, refusal or neglect of any appraiser to act, the register shall forthwith substitute another in his place.

XXXIV. If any register shall grant letters testamentary to any person not being an inhabitant of this commonwealth, or shall grant any letters of administration, or letters of collection to any person or persons whatsoever, without having, in either case, taken a bond and sureties in the manner hereinbefore prescribed, such letters shall be void, and every person acting under them shall be deemed and may be sued and in all respects treated as an executor of his own wrong; and the register granting the same and his sureties shall be liable to pay all damages which shall accrue to any person by reason thereof.

XXXV. All bonds taken by any register in pursuance of this act from any executor, administrator or collector may be excepted to, before such register by any person interested, both in respect of the sufficiency of the sureties therein, and of the sum in which they may be bound: And whenever any such exception shall be so made to any such bond, the register shall give notice thereof to the executor, administrator, or collector, and require him to appear before him in a reasonable time, not exceeding ten days, and shew cause against the allowance of such exception; and if, upon the hearing of the objections of all persons interested, and of such executor, administrator or collector, or of such of them as shall appear, such register shall see cause, he shall order such executor, administrator or collector to find additional sureties, or to give security in a larger amount, as the case may require; and if such executor, administrator or collector shall refuse to comply with such order, or if he shall neglect so to do, during the space of thirty days, after the making thereof, the register shall revoke the letters granted to him, and grant other letters, in such form as the case shall require, to the persons by law next entitled thereto; they giving to such register the security by him ordered as aforesaid: *Provided*, that no such exception shall be so made, or proceedings thereon be had before the register, after one year elapsed from the time of the filing of a full and perfect inventory by such executor, administrator or collector, of the whole of the estate in question.

XXXVI. Every register, before he shall allow the accounts of any executor or administrator, shall carefully examine the same and require the production of the necessary vouchers and evidence of the several items contained in it, except for small sums claimed for expenses. The executor or administrator may from time to time, if so required by persons interested, make partial settlements, including the whole course of his administration, to the time of rendering such partial accounts; and if there shall be more than one such partial account, the balance, whether of credit or

debit in the antecedent account, shall be carried into the next account, so that the progressive liquidation and disposition of the estate shall fully appear: the final account shall exhibit the aggregate of the entire administration of such executor or administrator: and if the accountant shall be a collector or guardian, the register shall proceed in like manner as far as the circumstances of the case shall admit: And to every account shall be subjoined the oath or affirmation of the accountant, subscribed by him, that such account is just and true, both as respects the items of charge and of discharge.

XXXVII. Every register having allowed and filed any account in his office, shall prepare and present a certified copy thereof to the Orphans' Court of the respective county, at its next stated meeting, being not less than thirty days distant from the time of such filing and allowance; of all which he shall give notice to all persons concerned, in the following manner, viz: by an advertisement, enumerating all the accounts to be presented at any one time to the said court, in at least two newspapers, if there be two, published in the respective county, or if there be but one newspaper published in such county, then in that one, at least once a week during the four weeks immediately preceding the meeting of the court at which such account shall be presented; setting forth in substance that the accountants (naming them and the character in which they respectively act,) have settled their accounts in the office of the said register, and that the same will be presented to the Orphans' Court for confirmation at a certain time and place (mentioning the same); and also, by setting up conspicuously in his office, and in at least six other of the most public places in the county, at least four weeks before the time appointed for the presentation of such accounts as aforesaid, fairly written or printed copies of such advertisement; and the actual expense of such advertisement according to the usual rates of advertising in such newspapers, and of the setting up of such notices, shall be divided among all the accounts presented at the same court; and the proper proportion thereof only shall be charged in any of the said accounts, and allowed to the register as the cost of such advertisement and notices.

XXXVIII. From all the judicial acts and decisions of the several registers, appeals may be taken to a Register's Court of the respective county, to be appointed and called by the respective register in the manner prescribed by this act: *Provided*, that such appeals be made within the term of three years.

XXXIX. It shall be the duty of every register to make and certify under the seal of his office, true copies of all bonds, inventories, accounts, actings and proceedings whatsoever, remaining in his office, being thereunto required by any person having an interest therein, and to deliver the same within a reasonable time, to such person applying therefor, on receiving the fee allowed to him by law for such copy or copies; and if any register shall refuse, after the tender of his lawful fees, to make or deliver such

copy or copies as aforesaid, he shall be deemed guilty of a misdemeanor in office.

XL. Whenever any receipt given by the treasurer of any county, for monies paid to him, by any executor or administrator for the use of the commonwealth, under the provisions of the laws relating to collateral inheritances, shall be lodged by such executor or administrator with the register having jurisdiction of his account, such register shall, without delay, record such receipt and immediately thereupon transmit the same, to the auditor general of this commonwealth.

XLI. Every register shall annually, in the month of September, account for under oath or affirmation to the auditor general, and pay into the treasury of this commonwealth, all monies which may have been received by him for the use of the commonwealth, during the year immediately preceding the first day of the said month; deducting therefrom such sum only as shall be allowed to him by law, for receiving and paying the same.

XLII. Every register shall annually, in the month of October, render an account under oath or affirmation to the auditor general, of all fees which shall have been received by him, or by any person employed by him, for official acts and services performed in his office, and whenever the amount thereof, as allowed by the auditor general, shall exceed the sum of fifteen hundred dollars, he shall pay one half of the excess into the treasury of the commonwealth.

XLIII. On the probate of any will and the granting of letters testamentary thereon; also on the granting of any letters of administration or of collection, every register shall demand and receive for the use of the commonwealth, in each case the sum of fifty cents.

XLIV. The fees to be received by the several registers, shall be as follows, viz: for, the probate of a will and letters testamentary thereon, one dollar; for registering the same, for every ten words, one cent; for letters of administration or of collection, seventy five cents; for bonds taken of executors, administrators or collectors, one dollar and fifty cents; for appointing appraisers issuing a warrant to them and endorsing the form of the appraisers oath, seventy five cents; for filing and entering the renunciation of an executor or administrator, fifty cents; for annexing a will for every ten words one cent; for issuing a citation or attachment with seal, fifty cents; for entering a caveat, twenty five cents; for issuing a commission to take the testimony of witnesses, seventy five cents; for issuing a precept for an issue, thirty seven and a half cents; for administering an oath or affirmation six cents; for filing a list of articles appraised, twenty five cents; for filing a list of articles sold at vendue, twenty five cents; for examining, passing and filing the account of an executor, administrator or collector, two dollars and fifty cents; for advertising executors', administrators' or collectors' accounts, two dollars; for advertising guardians' accounts, one dollar; for every copy if demanded, of such account not exceeding seventy five items, with certificate and seal, one dollar; and for

every additional item one cent; for entering exceptions to an executor's, administrator's or collector's bond, and hearing the same, fifty cents; for holding Register's Court per day, two dollars; for every search where no other service is performed, for which fees are allowed, twenty cents; for certificate and seal, fifty cents; for the copy of any bond filed in his office, fifty cents; for commissions on taxes received by him, for the use of the commonwealth, on proceedings in his office, three cents on every dollar: *Provided*, that in all cases, where the value of the whole estate of the decedent, shall not exceed the sum of two hundred and fifty dollars, the register shall receive in lieu of all fees for official acts herein before specified, the sum of two dollars and no more.

XLV. Whenever any proceeding before a register or a Register's Court shall be wholly ended and the fees and costs accrued thereon shall remain, during the space of thirty days thereafter, due and unpaid, such register may file a bill thereof under his hand and the seal of his office in the Court of Common Pleas of the county and upon the docketing thereof an execution may be issued in the name of the commonwealth to levy the amount of the said bill, in like manner as executions may issue to levy costs accrued in the courts of common law; and subject in like manner to control and taxation by the said court.

XLVI. The register of wills and the judges of the Court of Common Pleas of any county or any two of the said judges shall compose and hold, from time to time as occasion may require, the Register's Court of such county; and when convened according to law, shall have all and singular the powers and jurisdictions belonging to such courts; and may and shall do all such judicial acts in all matters lawfully brought before them as belong and of right ought to belong to the office of said register:—And it shall be the duty of such register to keep a record of the proceedings of such courts in a book to be provided by him for the purpose, with a sufficient index thereto; which book shall remain in the register's office.

XLVII. The testimony of all witnesses examined in any cause litigated before any Register's Court shall be taken in writing and made a part of the proceedings therein; upon which testimony the court, having jurisdiction of such cause by appeal, may affirm, reverse, alter or modify the decree of the Registers Court.

XLVIII. Whenever a dispute upon a matter of fact arises before any Register's Court, the said court shall, at the request of either party, direct a precept for an issue to the Court of Common Pleas of the county for the trial thereof, in the form hereinbefore prescribed for the direction of registers, changing such parts thereof as should be changed according to the circumstances of the case; and the facts established by the verdict returned shall not be re-examined on any appeal.

XLIX. Any party aggrieved by the final sentence or decree of any Register's Court, or his legal representatives, in any case where the sum, mentioned in such sentence or decree or the sum or mat-

ter in controversy shall exceed one hundred and fifty dollars in value, may appeal therefrom to the Supreme Court; but no appeal from any decree of such court concerning the validity of a will or the right to administer shall suspend the power or prejudice the acts of any administrator; nor of any executor who shall have given sufficient security to the register for the faithful administration of his trust:—And in case of the refusal of such executor to give such security, the said register shall grant letters of administration during the dispute which shall suspend the power of such executor during that time.

Provided always, that such appeal be made within the term of one year from the time of pronouncing such final sentence or decree.

Contents

OF THE SEVERAL SECTIONS OF THE BILL RELATING TO REGISTERS AND REGISTERS' COURTS.

No. 3.

Remarks

UPON THE BILL RELATING TO REGISTERS AND REGISTERS' COURTS.

The subjects which we have thought appropriate to this bill have been already mentioned (p. 7). They occur in the following order:

1. Those provisions which relate to the register as an officer.
2. Those which relate to his jurisdiction.
3. Those which relate to the probate of wills and testaments, and the granting of letters thereon.
4. Those which relate to the granting of administration in its various forms.
5. The subject of the settlement of accounts is next in order, and this is followed by

6. Certain sections enjoining upon the register duties of a miscellaneous character.

7. Two sections regulating the fees of the register, and providing a mode in which they may be collected, conclude this portion of the bill.

8. The last four sections relate to the constitution, jurisdiction and practice of the Registers' Courts.

The new provisions which have been introduced will be best exhibited by a brief examination of the several sections in their order.

We premise however, a remark upon the enacting clause of the bill. The form in use was adopted from a system of legislation essentially different from our own. It is also redundant. We have modified and abridged it. It has been usual to preface each section of an act with a similar clause. We have omitted to do so, supposing it unnecessary.

Section I. The first section provides the official oath and bond of the registers. It is derived from the Constitution of the United States, article 6, section 3—the Constitution of Pennsylvania, article 8—the act of the 14th March, 1777, section 3—the act of 12th March 1791, section 1, and the act of 6th April, 1830, section 9. Nothing in this section requires observation but the sum in which the bond is to be given. The act of 14th March 1777, section 3, provides the security to be given by the registers of certain counties therein mentioned. The acts establishing new counties, passed since that time, have usually provided, in general terms, for the securities to be given by county officers. To these acts, which are numerous, it is unnecessary to refer. The act of the 6th April, 1830, requires a separate bond of every register in one third the sum required of the sheriff of the respective county, with a condition extending only to the duties enjoined by that act. The alteration proposed is, that every register shall, hereafter, give one bond in half the sum required by law of the sheriff of the respective county, with a condition extending to all his duties. The section has been framed accordingly.

Section II. and III. The register is required to cause his bond, after being duly acknowledged by him and his sureties, to be recorded and transmitted to the Secretary of the Commonwealth, and certified copies of the record thereof are (by section 3d,) made evidence in suits brought upon the original bond, according to the form and effect.

These provisions are digested from the act of 12th March, 1791, section 1, (*Purdon*, 749,) with this alteration however, that the newly appointed officer is required to transmit the bond, and to act without the intervention of the Secretary of the Commonwealth.

Section IV. This portion of the bill concludes with a provision taken from the act of 14th March, 1777, section 6, (*Purdon*, 702,) requiring every register to appoint and keep a deputy. The sureties of the register are made accountable for the conduct of the de-

puty. This provision is not in express terms contained in the act from which it is taken. In all other respects it is the same.

Section V. and VI. The next subject is the jurisdiction of registers. This, in respect of place, is limited to the respective county of each; in respect of subject, it is made to comprise the probate of wills, the granting of letters testamentary, of administration and of collection and the passing and filing of accounts; and in order to prevent interference, the act of one register in a matter belonging to the jurisdiction of another is declared to be void.

In respect to the granting of letters testamentary, of administration and of collection, the jurisdiction is determined by the place of the decedent's principal or family residence at the time of his decease, if it was within the commonwealth: if he had no residence within this commonwealth, then by the place where the principal part of the goods happen to be. The subject of jurisdiction is closed with a provision, making it in effect necessary in all cases to obtain letters under the authority of this commonwealth, to administer the estate of a decedent which may be found here

These provisions are new. Some of the reasons upon which they have been adopted are these: The jurisdiction of registers is intimately connected with that of the Orphans' Courts, and both may be said to extend in some form to the aggregate personalty of the commonwealth. Diversity or variety of jurisdiction would produce confusion—embarrass the Orphans' Courts and create inconvenience to those who may have occasion to investigate the course of an administration.

The practice of recognising foreign letters of administration is believed to be almost peculiar to this state. It originated in the act of 1705. We propose an alteration of the law in this respect. In the case of M'Cullough vs. Young, *(1 Binney, 63;* and see *1 Dall. 457)* the court admit that much inconvenience may arise from this provision of our law, and suggest that it may be a fit subject for legislative interposition. We have introduced the last of these provisions in consequence of this suggestion and with entire conviction of its propriety.

In these sections, letters of collection are mentioned as a subject of the register's jurisdiction. This variety of letters is unknown to our acts of Assembly. The reasons for introducing them will be given hereafter.

Section VII. The next subject of the bill is the probate of wills and testaments. The first of this series of sections empowers the register to cite any person having the possession or control of a testamentary writing, alleged to be the will of a decedent, to produce and deposite it in the office for probate: and it makes it a misdemeanour to conceal or withhold any such writing during the space of fifteen days after a personal notice, from the register, to produce it: or a ground of action for damages by the person aggrieved.—It is respectfully suggested that a provision of this sort is expedient, and that the penalty is not unduly severe.

Sections VIII and IX. The register is also authorised to issue citations under penalty, to witnesses residing within the county or within forty miles of his office, to appear before him and give testimony; and in case of their default to compel appearance by attachment: or he may issue commissions to take the depositions of witnesses residing in other counties, states or countries, upon interrogatories filed in his office.

These provisions seem to be merely incidental to the general powers of the register, and are essential to the due execution of the duties of his office. Without inquiring however what powers the register may be supposed already to possess, it is obvious that the importance of the interests which must pass his office, require the usual means of protection.

Section X The tenth section is in part new. In order to prevent undue haste in the probate of wills, it provides that no letters testamentary or of administration with a will annexed shall pass the seal of the register's office, till five days after the day of the death of the decedent, be fully expired. A similar provision is introduced, in a subsequent section, in relation to letters of administration in cases of intestacy. It is believed that inconvenience can seldom arise from so short a delay. If however a case should occur requiring immediate interposition, the exigency may be supplied by the letters of collection hereinafter provided. Cases have occurred in which this provision would have been found useful. The remainder of this section relates to nuncupative wills, and is taken with slight alterations from the act of 1705, section 5, (*Purdon* 801.) The original act provides that process shall issue to call in the widow *or* next of kindred. This section provides, that the process shall issue to call in both.

Section XI. The provisions of this section relate to oral testimony of nuncupative wills. It is derived from the act last mentioned, section 4, and contains nothing new.

Section XII. The provisions of this section are new.—They relate to the granting of letters testamentary upon wills and testaments already proved in other states or countries and supposed not to be under the control of the executor or party interested. By the law as it now is, letters testamentary and of administration, granted in any of the United States, confer an authority to perform acts of administration in this state. An alteration of the law in this respect has been suggested (section 6.) To facilitate compliance with the proposed alteration this section authorises the production of duly authenticated copies of wills proved abroad in lieu of the original and declares that proceedings thereon may be had, so far as it respects the granting of letters, as upon the originals. The section then prescribes a mode of authentication, which shall be deemed sufficient, in the first instance, to authorise the granting of letters. This clause is framed with some alterations upon the act of Congress passed the 26th May, 1790, 2 Story's laws 102.

Section XIII. The preceding sections having provided the means of compelling the production of wills for probate, and the atten-

dance of witnesses; having also supplied certain rules for the direction of registers in matters of evidence, provision is made in this section for the decision of controversies which by existing laws require the intervention of a jury. When opposition is intended to the admission of a testamentary writing to probate, the practice is to lodge with the register what is termed a *caveat*.—The register thereupon convenes a Register's Court according to the direction of the act 7th June, 1712, (*Purdon* 703—*n*.) If the legal sufficiency of the writing or the conclusions of law from admitted facts only, are in controversy, that court is the proper tribunal and competent to the decision of the entire question. But where the controversy relates, as it frequently does, to extrinsic facts, such as the capacity or incapacity of the supposed testator, the court is required by the act 13th April, 1791, section 18, (*Purdon*, 704,) to send at the request of a party an issue into the Court of Common Pleas, for the trial of the facts in dispute. As the court can in such case exercise no discretion, the direction of the act 7th June, 1712, seems unnecessary. The section now the subject of remark, proposes an alteration of the practice in this particular. For this purpose it authorises the register in all cases where any matter of fact touching the validity of a testamentary writing shall be alleged as the ground of a caveat, to send at the request of a party, a precept in the name of the commonwealth to the Court of Common Pleas directing an issue.—The form of the precept is given and the result of the trial is made conclusive of the facts established by it. By this method circuity and some inconvenience and delay will be avoided. The precept has been framed with a view to the exigency. It is unnecessary to remark upon its contents in detail. The course of the proceeding required by the precept is left to the practice of the court to which it is sent. Detail in this particular would have been inconsistent with necessary brevity—and also would have introduced matters inappropriate to this title. With this section the proceedings preliminary to probate conclude.

Section XIV. This section requires the register to administer an oath or affirmation to executors, &c. before issuing letters to them. The form of the oath is given. It contains the clause required by the act 7th April, 1826, section 5, enjoining compliance with the law relating to collateral inheritances. A proviso is added, authorising an alteration of the form in the case of executors, whose testator's domicil, was out of the commonwealth.

Section XV. This section requires the register to take bonds from executors who are not inhabitants of the commonwealth in a sum proportionate to the value of the estate to be administered and a subsequent section makes it a breach of his official bond to issue letters testamentary to any such executor without complying with the injunction of this section. It may be observed that this provision is one of a series or system which have been adverted to, in our remarks upon the sixth section of the bill, and the security here provided was a motive with us for the change there

proposed. The act 3d April, 1829, (*Pamph. L. L.* 122,) authorises proceedings to vacate letters testamentary where the executor has removed from the state or has ceased to have a known residence therein during a certain period. The policy of that act may perhaps be supposed to prohibit the granting of letters testamentary to non-resident executors. We suppose that it may at least justify the provisions of this section. The expediency of going further than is here proposed, at least in the case of testators whose residence was out of this state, is doubtful. By the law of nations and the adjudication of our own courts, the law of the domicil regulates the succession to personalty. No infringement of this rule is intended, nor any further interference in the management or disposition of the estate to be administered than the security of the paramount interests of creditors and of the commonwealth require: and in all cases—whether the testator's domicil was within this state or elsewhere; and whether the executors were non-residents at the time of their appointment or become so by removal—every useful purpose may perhaps be secured by placing them, in respect of security, on the footing of administrators. By this method also due regard will be had to the testator's views in the appointment of representatives.

Section XVI. This section requires the recording of all wills and copies of wills proved abroad and produced in lieu of the originals, and that they shall remain on file in the office of the register unless removed for judicial purpcses. The remainder of the section is digested from the act of 1705, section 1, (*Purdon* 800.) This section concludes the subject of the probate of wills and the granting of letters testamentary.

The granting of letters of administration is next in order. Eight sections occur upon this subject. The first three, specify certain cases which such letters shall be granted—the fourth relates to the time of granting them; the fifth and sixth ascertain the persons entitled to the administration and the last two of this series provide the securities which the register is to require from the administrators.

Section XVII. The seventeenth section, which is the first of this series, provides for cases of intestacy by the renunciation of the trust of execution by all the executors. This case is mentioned in the statute 21, Henry 8 c 5, section 3 (*Rob. Dig.* 250,) a part of which is referred to, by the Judges of the Supreme Court as being in force in this state.

Section XVIII. By the common law the trust of a sole executor who has proved the will of his testator may be transmitted to his executor: The same rule applies to the survivor of several executors. In England this principle is frequently important to the conveyance of the title to real estate. The act 12th March 1800 section 3, (*Purdon* 278,) enables administrators with the will annexed to execute the powers conferred upon executors by will in relation to lands. This act having thus provided for the cases in which the powers of the executor of an executor are most

important, it is proposed by this section to abolish his powers altogether: Accordingly the register is directed to issue letters of administration with the will annexed in all cases where a sole executor or the survivor of several executors shall die before the administration of the estate of his testator is ended. We will only add that convenience in the administration of the two estates and the security of creditors and others interested in different rights recommend the adoption of the section under consideration.

Section XIX. Vacancies occurring in the administration of an estate by reason of any decree of the Orphan's Court are provided for by this section. In all such cases the register is directed to grant new letters to the persons entitled in the form required by law.

Section XX. This section provides that letters of administration shall not be granted upon the estate of a decedent intestate till five days after his decease have expired. It has been already adverted to, (section tenth.) By the practice of the Ecclesiastical Courts in England, fourteen days must elapse before letters of administration can be obtained. This seems longer than is necessary. The last clause of this section provides, that letters of administration shall not be originally granted upon the estate of a decedent after twenty-one years elapsed from the day of his decease except upon special cause shewn. This provision is new, but it is supported by the policy of the acts of limitation—Where no person has come forward to adjust a decedent's estate within that period it cannot be presumed that important interests exist requiring an administration; or, that they could be asserted consistently with the interests of others. The clause does not apply to cases where an administration commenced has become vacant.

Section XXI. In this section, we have endeavoured to arrange and condense the material provisions of the statute 21 Hen. 8 c. 5, *(Rob. Dig. 250,)* in relation to the persons entitled to letters of administration. Considerable alterations have been made in phraseology. Where the widow and kindred refuse or are incompetent, the register is authorised to grant the administration to creditors, or fit persons. We have added a proviso, from the act 21 March, 1772, section 5, *(Purdon 371.)* giving the husband the right to administer upon the estate of his wife deceased. Another clause is added, giving residuary legatees the right to administer, where letters of administration with the will annexed, are necessary.

Section XXII. The guardians of persons under the age of twenty one years—when such are the only persons entitled to letters testamentary or of administration, under the preceding section—are invested with the right to administer, during the minority of their wards. It will be perceived that this provision, alters the law relating to infant executors. The trust of the execution of a will is often important, and sometimes attended with difficulty: We think it should in all cases, be exercised only by persons of mature age. It is to be recollected however, that the trust of the

execution of a will or the administration of an estate, is often a right of considerable value: For this reason it is conferred upon those, whose duty it is to account for whatever value it may possess.

Section XXIII. This section is substantially the same, as the first section of the act of 19 April, 1794, *(Purdon 372)*. It provides the form of the bond, which the register is required to take upon his granting letters of administration. A clause has been inserted in the condition, to secure compliance with the laws relating to collateral inheritances. Some verbal alterations have been made for the sake of brevity, and one was made necessary by the transfer of the section, from the original act to this bill. The condition allows forty days for the filing of the inventory: This is an extension of the time limited by the act of 19 April, 1794. It has been observed, that the same period is contained in the condition of the bond, required of executors resident abroad. In a subsequent part of the bill, a provision is introduced, requiring the register to appoint appraisers of decedents' estates: The reason of which will be given hereafter. It is material at present only to remark, that the extension of the time allowed for the filing of the inventory, was made in consideration of the delay or inconvenience to which the administrator may be subjected, by the provision relative to the appointment of appraisers. A proviso is added, authorising an alteration of the form of the condition, in cases of special administration.

Section XXIV. This section provides the form of the oath of administrators. It contains the clause required by the act, relating to collateral inheritances before mentioned, *(Pamph. L. L. 227, 7 April,* 1826.)

Section XXV. This section provides for the call of a Register's Court, for the decision of disputable and difficult questions, arising before the register in proceedings for the probate of wills or the granting of administration. We may here advert to some of the observations made upon the thirteenth section. It is intended to supply the the provisions of the act 7 June, 1712, *(Purdon 703—n)* upon the same subject.

Sections XXVI—XXX. The next five sections relate to letters of collection. In substance they provide as follows: In all cases of delay in the granting of letters testamentary or of administration, arising from the negligence or absence of those having the right, or from any other cause: also in all cases requiring interposition before administration can lawfully or conveniently be granted, the register is authorised to issue letters to any fit persons for the collection and preservation of the estate of a decedent. The form of the letters is given, and the effect of them declared. Security by bond with sureties is to be required of the collector in a sum proportionate to the value of the estate. The form of the condition of the bond is given in the fourth of these sections. The fifth requires the register to administer an oath to the collector, the form of which is also given.

Upon these letters we have to remark, that they are not intended to interfere with, or supply an administration in any of the forms or cases hitherto practiced. They are confined in express terms to cases of delay and cases of urgency. Such may occur. There may be no known kindred or creditors to assert a claim to the administration—or none who desire it—or none within the commonwealth. It may happen also, that the disposition of the estate of a decedent is to be regulated by the act of Assembly relative to escheats. It will be recollected also, that the bill proposes to prohibit the granting of administration immediately after the death of a decedent. To supply these various exigencies a temporary officer, clothed with powers sufficient to protect and preserve the estate, appeared useful. This is the design of the collector.—To accomplish the object he is empowered to sell perishable and chargeable property; to collect debts; revive judgements and other liens belonging to the estate, and to do whatever else may be necessary to preserve the estate undiminished in value. To prevent acts and proceedings commenced by him from becoming abortive, it is provided that the personal representative may pursue and perfect them. This seemed necessary, as he is liable to be superseded at any time. With the same motive, provision has been made for the delivery of the effects in his hands immediately on the revocation of his powers. No authority however, is given to the collector to intermeddle with real estate. No action can be brought against him as a representative of the decedent. In the bill relating to the Orphans' Court provision is made for coercing an adjustment of his accounts in the manner provided for the cases of executors and administrators. Should these suggestions meet with the approbation of the legislature, it occurs to us, that further useful and convenient provisions in relation to this officer may hereafter be made. We venture to suggest the case of a decedent intestate, without known kindred, in which the commonwealth would be principally concerned to preserve the estate. After a limited time, the collector might be required to perform the duties of an administrator for the benefit of the commonwealth, by selling and reducing to his possession the entire personalty, and paying the proceeds thereof into the public treasury for such uses as the legislature shall see proper to declare.

Section XXXI.—XXXIII. The next three sections relate to the appointment of appraisers. In substance they are as follows: The register is required to appoint two discreet and disinterested persons to appraise the personal estate of the decedent. The form of a warrant to that effect is given. On the warrant the register is required to endorse the form of the appraiser's oath. The practice proposed by these sections is new. The object of it is to provide greater security for the creditors and other persons interested in the estate of a decedent. An additional motive is to guard the intent of the law relating to collateral inheritances, from evasion. By the provisions of that law, the tax upon any species of property other than money or real estate is to be computed upon the ap-

praised value thereof, as filed in the register's office. It seemed to us proper that the valuation in such cases should be made by persons appointed under official responsibility.

Section XXXIV. This section is principally derived from the act 27th March, 1713, section 2, (*Purdon*, 611.) It declares all letters void which shall be granted without the security required by the preceding sections, and the register and his sureties are made liable for all damages sustained by reason thereof. There is nothing new in the section except the extension of its provisions to the cases of letters of collection, and letters testamentary granted without security to executors residing out of the Commonwealth.

Section XXXV. This section is designed as a substitute for so much of the second section of the act 27th March, 1713, (*Purdon*, 611,) as relates to the taking of insufficient sureties. It provides, in substance, that any person interested in the estate of a decedent may lodge with the register, at any time within a year from the filing of a full and perfect inventory, an exception to the sufficiency of the security taken by him. It prescribes to the register a method of proceeding and authorises him to revoke the letters &c. granted, if additional security, when ordered, be not given. It frequently happens that the value of the personalty of a decedent is not correctly ascertained at the time of granting administration. The provisions of this section are designed to supply means by which the register may revise his own proceedings in this particular, and correct inadvertent and perhaps unavoidable errors. It seems more convenient than the present practice. It will be observed that all those provisions of the act of 1713 before mentioned, which relate to embezzlement or mismanagement are provided for in the bill relating to the Orphans' Court. It is the single case of the sufficiency of the security or sureties that is provided for in this section, of which the register by the present practice, is the judge in the first instance.

Section XXXVI. This section relates to the passing of accounts before registers. The design of it is to direct such a method of accounting as will exhibit distinctly the progressive liquidation and disposition of the estate. In final accounts the results of preceding accounts are to be introduced. This is required in order that such accounts may exhibit the sum total of the estate and of the administration. As matter of direction, it may be useful to registers, and will tend to produce uniformity of practice in this particular. It is supposed that this method of accounting, to some extent, already prevails in practice.

Section XXXVII. The register is required by this section to prepare and present to the Orphans Court of the respective county copies of all accounts allowed by him with his certificate thereof. He is required to give previous public notice to all concerned of the presentation. All the accounts to be presented at one time, are to be enumerated in his advertisement and notices, and the actual expense is to be apportioned among all the accounts. This section is derived with slight alterations from the acts 4th April

1797 section 9 and 1st April 1823 section 1 (*Purdon* 616, 619.) The act of 1797 requires the register to give notice in three of the most public places of the county thirty days before the court. This section requires him to give notice in six of the most public places four weeks before the court. We have increased the number of places for reasons mentioned in our remarks upon the bill relating to the Orphans Courts.

Section XXXVIII. This section relates to appeals from the register to a Register's Court. The act 30th September 1791 section 2 (*Purdon* 704,) limits the time of appeal to two years, with a proviso extending it, in the cases of married women, minors, of persons in prison, out of the United States or of unsound mind. The section now the subject of remark, allows three years but makes no such discrimination of persons. We think that exceptions of this nature are in all cases of doubtful propriety. No such provision is contained in the act limiting the time of appeals from the Orphans' Courts. The suspension of the limitation may be attended with severe consequences to those whose interests it is designed to protect and it can hardly occur, as we supppose, that any of the persons before mentioned will be without other means sufficient for their protection.

Section XXXIX—XLIII. These sections relate to miscellaneous duties of the register. Systematical arrangement required their introduction into this bill. *Section* 39 is framed with a view to some provisions in the act 27th March 1713 sect. 16 (*Purdon* 614,) and also in the statute 21 H 8 c 5 section 5. *Section* 40 is derived from the act 7th April 1826 section 2 (*Pamph. L. L.* 227.) *Section* 41 from the act 6th April 1830 section 7. (*Pamph L. L.* 275.). *Section* 42 from the act 10th March 1810 (*Purdon* 608.) *Section* 43 from the act 6th April 1830 section 5. We submit them without further remark.

Sections XLIV—XLV. These sections regulate the fees of registers, and provide a method in which they may be collected. The existing fee bill as far as it extends, is exactly copied, (*Purdon* 281, 6 *Penn'a. L. L.* 232.) For the new duties proposed, proportional fees have been assigned. There is a proviso to this section, in favour of the estates of poor persons, giving the register two dollars, in lieu of fees, for all official acts and services, where the estate does not exceed two hundred and fifty dollars in value. The register is authorised under certain restrictions, to file a bill of his fees and costs in the Court of Common Pleas of the county, and levy them by means of the process of that court. This method is recommended by convenience of the register, as well as by the security which it affords to the party, against improper demands.

Sections XLVI—XLIX. The residue of the bill relates to the Registers' Courts. It is to be composed of the register, and any two judges of the Court of Common Pleas of the respective county. This is the provision of the constitution, see article V. sec. 7. (*Purdon* 703, 705.) The powers and jurisdiction of the court, are then described. In substance they are those contained in the

act, 7 June, 1712. (*Purdon* 703—*n*) The register is required to record the proceedings of his courts in a book; and to frame a sufficient index thereto. This last provision is new, but of obvious utility. The testimony of witnesses examined in these courts is to be committed to writing, and error in law or in fact may be assigned therein. These provisions are from the act 13 April, 1791, section 18. (*Purdon* 704.) The court on the request of a party, is required to direct a precept into the Court of Common Pleas, for the trial of disputed facts in the manner prescribed for the direction of registers. The verdict returned is made conclusive of the facts established thereby. (*Purdon* 704.) Finally an appeal is given from the Registers' Court, directly to the Supreme Court, where the value in controversy exceeds one hundred and fifty dollars. (*Purdon* 705.) In the act of 1794, the amount expressed, is fifty pounds in value. We have thought it expedient in this and other instances, to express value in the established currency of the United States. It is proper to remark also, that as the law now is, an appeal lies to the Circuit Court, and from that court to the Supreme Court. (*Act* 20 *March*, 1799, *sec.* 3.) We think it desirable to abridge the labours of the judges of the Supreme Court, as far as it can be done, without prejudice to the interests of the public. This provision, it is believed, will have that effect, by abridging in most cases the course of litigation. A proviso is added, limiting the time of appeal to one year. This provision is new.

No. 4.

A Bill

RELATING TO ORPHANS' COURTS.

An act relating to Orphans Courts.

It is enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, as follows:

Section I. The Judges of the Court of Common Pleas of each county, or any two of them, shall compose the Orphans' Court of such county: *Provided*, that in case of the absence of the president, if any person interested in the business before the court, shall request the same to be continued until the president shall attend, such business shall be continued accordingly.

II. The Orphans' Court is hereby declared to be a court of record with all the qualities and incidents of a Court of Record at common law. Its proceedings and decrees in all matters within its jurisdiction shall not be reversed or avoided collaterally in any other court; but they shall be liable to reversal, modification or

alteration on appeal to the Supreme Court, as hereinafter directed.

III. The Orphans' Court of the city and county of Philadelphia, shall be held during every term of the Court of Common Pleas of the said city and county, at such times and as often as the Judges thereof shall think necessary or proper. And the Orphans' Court of every other county of this commonwealth shall be held during the first week of each term of the Court of Common Pleas of the respective county, and at such other times as the Judges thereof shall think necessary or proper.

IV. The jurisdiction of the several Orphans' Courts of this commonwealth shall extend to, and embrace the appointment, control, removal, and discharge of guardians; the settlement of their accounts; the removal and discharge of executors, administrators and collectors, deriving their authority from the register of the respective county; the settlement of the accounts of such executors, administrators and collectors; and the distribution of the assets, or surplusage of the estates of decedents, after such settlements, among creditors, or others interested; to the sale or partition of the real estate of decedents among the heirs; and, generally, to all cases within their respective counties, wherein executors, administrators, guardians or trustees are, or may be possessed of, or undertake the care and management of, or are in any way accountable for, any real or personal estate of a decedent. And such jurisdiction shall be exercised in the manner hereinafter provided.

V. The Orphans' Court of each county shall have the care of the persons of minors resident within such county, and of their estates; and shall have power to admit such minors, when and as often as there shall be occasion, to make choice of guardians, and to appoint guardians for such as they shall judge too young, or otherwise incompetent to make choice for themselves: *Provided* that persons of the same religious persuasion as the parents of the minors, shall in all cases be preferred by the court in their appointment; and such appointment or admission of a guardian by the Orphans' Court of the county in which the minor resides, shall have the like effect in every other county of this commonwealth, as in that by the Orphans' Court of which he shall have been so admitted or appointed.

VI. No executor or administrator shall be admitted or appointed by the Orphans' Court, guardian of a minor having an interest in the estate under the care of such executor or administrator *Provided* that nothing herein contained shall be construed to extend to the case of a testamentary guardian.

VII. No appointment of a guardian made or granted by any authority out of this state, shall authorise the person so appointed, to interfere with the estate or control the person of a minor in this state: *Provided*, that such foreign guardian may, at the discretion of the court, be appointed by the Orphans' Court having jurisdiction, on giving security for the due performance of his trust.

VIII. The Orphans' Court, having jurisdiction, whenever they may deem it proper, may require a bond with good and sufficient security, from every guardian of a minor, whether admitted or appointed by the court, or created by will; which bond shall be filed in the office of the clerk of the court, and be considered in trust for all persons interested. The bonds shall be taken to the commonwealth in such penalties as the court shall direct; and the and the condition shall be in the following form:

The condition of this obligation is such, that if the above bounden A. B., guardian of C. D., a minor child of E. F., late of deceased, shall at least once in every three years, and at any other time, when required by the Orphans' Court for the county of , render a just and true account of the management of the property and estate of the said minor, under his care; and shall also deliver up the said property, agreeably to the order and decree of the said court, or the directions of law; and shall in all respects faithfully perform the duties of guardian of the said C. D.; then the above obligation shall be void; otherwise it shall be and remain in full force and virtue: *Provided*, That nothing in this act contained, shall be construed to deprive a minor of any action or remedy, to which he may be entitled at the common law, against his guardian, for any cause whatever.

IX. Every such guardian shall, within forty days after any property of his ward shall have come into his hands or possession, or into the hands and possession of any person for him, file in the office of the clerk of the court, a just and true inventory and statement, on oath or affirmation, of all such property or estate.

X. Every such guardian, whether required by the court to give security or not, shall at least once in every three years, and at any other time when so required by the court, render an account of the management of the minors property under his care; which accounts shall be filed in the office of the clerk of the Orphans' Court, for the information of the court, and the inspection of all parties concerned: and every such guardian, unless previously discharged or removed, shall, on the arrival of his ward at full age, settle in the registers' office, a full and complete account of his management of the minors property under his care, including all the items embraced in each partial settlement; and the decree of the Orphans' Court, upon such final accounts, shall, like other decrees of the court, be conclusive upon all parties, unless reversed, modified, or altered on appeal.

XI. The Orphans' Court shall have power, upon the petition of any such guardian, to discharge him from the duties of his appointment: *Provided*, that no guardian shall be discharged from his liability for the estate of his ward, until he shall have rendered to the court, an account of the management of his trust; nor until the same shall have been submitted to competent persons, as auditors, for examination and their report thereon be confirmed by the court; nor until such guardian shall have surrendered the residue of the estate, standing upon his account settled and confirmed as

aforesaid, to a subsequent guardian of such ward, or to such other person as the court shall appoint, to receive such estate: *And provided further*, that in every such case, it shall be the duty of the court to appoint some suitable person, to appear and act for the ward, in respect of the settlement of such account.

XII. The Orphans' Court shall have power to remove any guardian, whether testamentary or otherwise, on due proof of his mismanagement of the minor's estate, or misconducting himself in respect to the maintenance, education, or moral interests of the minor. In any such case the court shall have power to order the offending guardian to deliver up, assign, transfer and pay over, to the successor in the guardianship, or to such person as the court shall appoint, all and every the goods, chattels, rights, credits, title deeds, evidences and securities, whatsoever, belonging to the minor, and in the hands, or under the power of the guardian; and to make such other order and decree, touching the premises, as the interests of the minor may require.

XIII. When any one shall die, leaving an infant child or children, without having made an adequate provision for the support and education of such child or children, during their minority, the Orphans' Court may direct a suitable periodical allowance, out of the minor's estate, for the support and education of such minor, according to the circumstances of each case; in which order may, from time to time, be varied by the court, according to the age of the minor and the circumstances of the case.

XIV. It shall be competent for the Orphans' Court, as occasion may require, to appoint a person to be receiver of the personal estate, and of the income of the real estate of a minor, and to hold and apply the same, under the direction of the court, for the benefit of the minor, until a guardian shall be duly appointed and qualified to act. The receiver shall give security in such manner, and to such extent as the court shall direct, and shall be entitled to such compensation, not exceeding in any case the rate of five per cent. on the monies received, as the court may direct.

XV. When an executor, administrator, guardian or trustee, shall have in his hands any monies, the principal or capital whereof is to remain for a time in his possession, or under his controul, and the interest profits or income thereof are to be paid away or to accumulate; or when the income of a real estate shall be more than sufficient for the purposes of the trust, such executor, administrator, guardian or trustee, may present a petition to the Orphans' Court of the proper county, stating the circumstances of the case, and the amount or sum of money, which he is desirous of investing: Whereupon it shall be lawful for the court, upon due proof, to make an order, directing the investment of such monies, in the stocks or public debt of the United States, or in the public debt of this commonwealth, or in the public debt of the city of Philadelphia, or on real securities, at such prices, or on such rates of interest and terms of payment, respectively, as the court shall think fit; and in case the said monies shall be invested, conformably to

such directions, the said executor, administrator, guardian or trustee, shall be exempted from all liability for loss on the same, in like manner as if such investments had been made in pursuance of directions in the will, or other instrument creating the trusts: *Provided*, that nothing herein contained shall authorise the court to make an order contrary to the direction contained in any will or other instrument in regard to the investment of such monies.

XVI. No account of an executor, administrator, collector, or guardian, shall be confirmed and allowed by the Orphans' Court, except in the cases herein specially provided for, unless it shall appear on the presentation of such account, that notice of such presentation has been given, conformably to the directions of the act, entitled "An act relating to registers and Registers' Court."

XVII. All accounts presented to the Orphans' Court by executors, administrators, collectors, guardians or trustees, except partial accounts rendered by guardians in pursuance of section the tenth of this act, shall, unless it be otherwise agreed by all parties interested, be examined by the court, or referred to suitable persons, not exceeding three in number, to be appointed by the said court, or by the parties, where they are all present, or duly represented, and competent to agree; and the persons so appointed, shall be sworn or affirmed to perform their duties with fidelity, and shall have power to administer oaths and affirmations, to parties and witnesses, in all cases referred to them.

XVIII. No executor or administrator shall be liable to pay interest, but for the surplusage of the estate, remaining in his hands or power, when his accounts are, or ought to be settled, and adjusted, in the register's office: *Provided*, that nothing herein contained, shall be construed to exempt an executor or administrator, from liability to pay interest, where he may have made use of the funds of the estate, for his own purposes, previously to the time when his accounts are or ought to be settled as aforesaid.

XIX. The amount of interest, to be paid in all cases, by executors, administrators and guardians, shall be determined by the Orphans' Court, under all the circumstances of the case; but shall not, in any instance, exceed the legal rate of interest, for the time being.

XX. Whenever there shall not be sufficient assets to pay all the debts of a decedent, it shall be the duty of the Orphans' Court, having jurisdiction, upon the application of the executor or administrator, to appoint auditors, to settle and adjust the rates and proportions of the assets, to and among the respective creditors, according to the order established by law:

Provided, nevertheless, that no creditor, who shall neglect or refuse to exhibit his account to the executor or administrator, within twelve months after public notice, given in one or more of the newspapers published in the county in which letters testamentary or of administrators may have been granted, or, if there be none in in such county, then in one or more newspapers published in an adjoining county, and continued in such newspaper for four conse-

cutive weeks, shall be entitled to receive any dividend of such remaining assets.

XXI. When any of the heirs, legatees, distributees, or creditors of a decedent, reside out of this state, or out of the United States, or from other circumstances it may be expedient that additional or further notice should be given of the settlement of the account of an executor, administrator, collector, guardian or trustee, or of the distribution of the assets, or surplusage of the estate, it shall be in the discretion of the Orphans' Court, to require such further or additional notice to be given by such accountant as they may think proper, to appear in court, or before the auditors by them appointed, as the case may be, at such times, as shall be fixed, for the examination of such account, or for the distribution of the assets or the surplusage of the estate.

XXII. An executor or administrator may, with the leave of the Orphans' Court, having jurisdiction, make a settlement of his accounts, so far as he shall have administered the estate committed to him, and the same being confirmed by the court, he may be discharged from the duties of his appointment, and surrender the remainder of the property in his hands, to such person as the court may direct.

XXIII. Whenever it shall be made to appear to the Orphans' Court, having jurisdiction of the accounts of any executor, administrator, collector, or guardian, or to any judge thereof, when such court shall not be in session, on the oath or affirmation of any person interested, that such executor, administrator, collector, or guardian, is wasting or mismanaging the estate, or property under his charge, or is like to prove insolvent, or has neglected or refused to exhibit true and perfect inventories, or render full and just accounts of such estate or property, come to his hands or knowledge, then, and in every such case, it shall be lawful for such court, or for such judge thereof, to issue a citation, to such executor, administrator, collector, or guardian, requiring him to appear on a day certain, before an Orphans' Court, to be convened for such purpose, if the said court shall not then be in session, and the case shall require despatch; and upon the return of such citation, the said court may require such security, of such executor, or such other and further security of such administrator, collector, or guardian, as they may think reasonable, conditioned for the performance of their respective trusts; which securities shall be taken in the name of the commonwealth of Pennsylvania, and filed in the said Orphans' Court, and shall be deemed and considered in trust, for the benefit of all persons interested in such estate: *Provided*, that if, in the cases above mentioned, it shall be made to appear to the said court, or any judge thereof, on oath or affirmation as aforesaid, that such executor, administrator, collector, or guardian, is about to remove from this commonwealth, or that the property under his charge may be wasted, or materially injured, before he can be reached by the ordinary process of the court, it shall be lawful for such court, or judge thereof, to issue a writ of attachment in the

first instance, with or without process of sequestration, under which the same proceedings may take place, as in other cases of attachment and sequestration, on mesne process, in the Orphans' Court; and on the return of such attachment, or of such attachment and sequestration, the court may proceed, as on the return to the citation above mentioned.

XXIV. If such executor, administrator, collector, or guardian, shall neglect or refuse to give such security, or such further security, so ordered, then the said court shall vacate such letters testamentary, of administration, or of collection, or remove such guardian, and award new letters, to be granted in such form as the case may require, by the register having jurisdiction, upon such security as the court shall think proper; and, in the case of a guardian, the court shall proceed to the admission or appointment of a new guardian, according to the circumstances of the case; and the said court shall, moreover, order the first executor, administrator, collector, or guardian, to deliver over and pay to his successor, all and every the goods, chattels and estate, in his hands, of the decedent, or minor, as the case may be.

XXV. If such superseded executor, administrator, collector, or guardian shall neglect or refuse to comply with the order of the court in the premises, the court may proceed against him by attachment, with or without sequestration, or may issue process for the delivery of the trust property and effects, as is hereinafter provided, or the successor may proceed at law against him and his sureties, if any there be, or against any other person, who may be possessed of any goods, or chattels, belonging to the estate of the decedent, or minor, as the case may be, or be indebted to him; or the remedies by execution and suit at law, may be pursued at the same time, if the case so require, until the end be fully attained.

XXVI. Whenever it shall be made to appear to the satisfaction of the Orphans' Court, having jurisdiction as aforesaid, or of any judge thereof, when such court shall not be in session, that an executrix, having minors of her own, or being concerned for others, is married, or like to be espoused to another husband, without securing the minors' portions or estates, it shall be lawful for such court, or for such judge thereof, to issue a citation, to such executrix; or, if she shall have been married to another husband, then to her and such husband, requiring her or them, as the case may be, to appear on a day certain, before an Orphans' Court, to be convened for such purpose, if the said court shall not then be session, as is hereinbefore provided for, in the case of delinquent executors, administrators, collectors, or guardians; and, on the return of such citation, the said court may require such security to be given, by such executrix, or by her husband, if she shall have been married again, as the circumstances of the case may require; and, if such executrix, or her husband as aforesaid, shall fail, or refuse to give such security, it shall be lawful for the said court, to vacate the letters testamentary, and to award new letters, to be granted by

the register, having jurisdiction, on such security, as they may think proper.

XXVII. When any executor, administrator, collector, or guardian, shall have been duly declared a lunatic, or habitual drunkard, it shall be lawful for the Orphans' Court, having jurisdiction over the accounts of such executor, administrator, collector, or guardian, to vacate the letters testamentary, of administration, or of collection, granted to such executor, administrator, or collector, and to remove such guardian, and to award new letters, to be granted in such form, as the case may require, by the register, having jurisdiction upon such security, as the court shall think proper; and, in the case of a guardian, the court shall proceed to the admission, or appointment of a new guardian, accordingly; and the court shall also make such order, for the security of the trust property, and for its delivery to the successor of such executor, administrator, collector, or guardian as the circumstances of the case may require.

XXVIII. When any executor, administrator, collector or guardian shall have removed from this state, or shall have ceased to have any known place of residence therein, during the period of one year or more, the Orphans' Court having jurisdiction of the accounts of such executor, administrator, collector or guardian, may, on the application of any person interested, and after a citation shall have been returned served or published, as is herein after provided, make a decree, vacating such letters testamentary of administration, or of collection, and remove such guardian, and award new letters, to be granted in such form as the case may require, by the register having jurisdiction, upon such security, as the court shall think proper; and, in the case of a guardian, the court shall proceed to the admission or appointment of another guardian, accordingly: *Provided*, that no decree as aforesaid, shall suspend the power or prejudice the acts of any person who may be joined with such executor, administrator, collector or guardian in the trust.

XXIX. Application may be made to the Orphans' Court, or any Judge thereof, in the cases mentioned in the 23d section of this act, by any surety in the bond of such executor, administrator, collector, or guardian; and, upon such surety making oath or affirmation, as required in that section, the like proceedings may be had, for the purpose of compelling such executor, administrator, collector or guardian, to give security; and thereupon, the court may order such executor, administrator, collector or guardian, to give such counter securities, as they shall judge necessary, to indemnify him against loss, by reason of his suretyship; and, if such executor, administrator, collector, or guardian, shall refuse, or fail, to give such security, within such reasonable time as the court shall order, it shall be lawful for the court to direct such executor, administrator, collector or guardian, to pay and deliver over, forthwith, to such surety, or to some other person for him, all goods, chattels, effects, and securities whatsoever,

for which such surety may be accountable: *Provided*, that such surety shall first give, to the satisfaction of the court, sufficient security, faithfully to preserve and account therefor, and deliver and dispose of the same, according to the order of the said court.

XXX. It shall be the duty of the prothonotaries of the Courts of Common Pleas of the respective counties, to file and docket, whenever the same shall be furnished, by any parties interested, certified transcripts or extracts of the amount appearing to be due from, or in the hands of any executor, administrator, guardian, or other accountant, on the settlement of their respective accounts in the Orphans' Court; which transcripts or extracts so filed, shall constitute liens on the real estate of such executor, administrator, guardian, or other accountant, from the time of such entry, until payment, distribution, or satisfaction; and actions of debt or scire facias may be instituted thereon, by any persons or person interested, for the recovery of so much as may be due to them respectively: *Provided, however*, that the liens thereby created, shall cease at the expiration of five years, from the time of the entry aforesaid, unless revived by scire facias, in the manner by law directed, in the case of judgments, in the courts of common law: *And Provided further*, that in case of an appeal from the Orphans' Court, the lien shall be for no more than for the amount finally found due, and decreed in the Supreme Court; and it shall be the duty of the prothonotary of the Common Pleas, on such decree of the Supreme Court being certified to him, to enter on his docket, the amount so found due, and decreed by the Supreme Court; and if such amount be greater than that decreed by the Orphans' Court, the lien for such excess shall take effect only from the time of entering the decree of the Supreme Court; but, if the amount be reduced by the final decree of the Supreme Court, the prothonotary shall reduce the amount originally entered on his judgment docket and index accordingly; and such final decree upon appeal, being certified, and filed in the said Court of Common Pleas, the said term of five years shall be counted from the time of such entry.

XXXI. When the executor, administrator, guardian, or other accountant, shall have fully paid and discharged the amount of such lien, the parties, who have received payment, shall acknowledge satisfaction thereof, to the extent of what they have received, on the record of the Court of Common Pleas; and in case of neglect or refusal so to do, for the space of thirty days, after request in writing, and tender of the cost and reasonable charges, such party shall forfeit and pay to the party aggrieved, the sum of fifty dollars absolutely, and any further sum, not exceeding the amount by such person received, as shall be assessed by a jury as on a trial at law; or, the Orphans' Court, on due proof to them made, that the entire amount due from such executor, administrator, guardian or other accountant, according to the final settlement of the said account, has been fully paid and discharged, may make an order for their relief, from such recorded lien; which order, being certified to the Court of Common Pleas, shall be entered on

their records, and shall enure, and be received, as a full satisfaction and discharge of such lien.

XXXII. The Orphans' Court, which possesses jurisdiction of the accounts of an executor, administrator or guardian, shall have power to authorise a sale or mortgage of real estate, by such executor, administrator or guardian in the following cases, viz:

1. On the application of the executor or administrator, setting forth that the personal estate of the decedent is insufficient for the payment of debts, and maintenance and education of his minor children, or for the purpose of paying the debts alone.

2. On the application of such executor or administrator, or of any person interested, setting forth, that on the final settlement of the administration account, it appears that there are not sufficient personal assets to pay the balance appearing to be due from the estate of such decedent, either to accountant or others.

3. On the application of a guardian, setting forth that the personal estate of the minor is insufficient for his maintenance and education, or for the improvement and repair of other parts of his real estate.

XXXIII. When the real estate, with respect to which application shall be made to the Orphans' Court, in the cases mentioned in the preceding section, is situated in the same county, the said court may order the sale or mortgage of such part, or so much of such real estate as to them shall appear necessary. When the real estate is situated in another county or counties, or in the same and another county or counties, and the Orphans' Court, which possesses jurisdiction over the accounts of such executor, administrator or guardian, shall be satisfied of the propriety of a sale or mortgage, of some portion of such real estate, not within their jurisdiction, it shall be lawful for such court to make a decree, authorising such executor, administrator or guardian, to raise so much money as the said court may think necessary, from real estate situated in such county or counties, as they may designate; and, thereupon, it shall be the duty of the Orphans' Court of the county wherein the real estate so designated is situated, upon the petition of such executor, administrator or guardian, to make an order for the sale or mortgage, as they shall think expedient, of so much, and such parts, of such real estate, as shall, in their opinion, be necessary to raise the specified sum. And such executor, administrator or guardian shall, in all cases, make return of his proceedings, in relation to such sale or mortgage, to the Orphans Court of the county in which the real estate so sold or mortgaged lies; when, if the same be approved by the court, it shall be confirmed.

XXXIV. *Provided*, That no authority for the sale or mortgage of real estate, lying in the same, or another county or counties, shall be granted, until the executor, administrator, or guardian, as the case may be, shall have exhibited to the said court, a true and perfect inventory, and conscionable appraisement, of all the personal estate whatsoever, of the decedent, or minor, as the case

may be, together with a full and correct statement, of all the real estate of such decedent, or minor, wherever situated, which has come to his knowledge; and also, in the case of an executor or administrator, a just and true account, upon oath or affirmation, of all the debts of the decedent, which have come to his knowedge; nor, in any case, shall such authority be granted, until such executor, administrator or guardian, shall have filed in the office of the clerk of the said court, a bond with sufficient security, to be approved of by the court, conditioned for the faithful appropriation of the proceeds of such sale or mortgage, according to their respective duties.

And, provided further, That no real estate, contained in any marriage settlement, shall by virtue of this act, be sold, or disposed of, contrary to the form and effect of such settlement; and, that the mansion house, or most profitable part of the estate, shall be reserved to the last.

XXXV. In all cases, where a sale shall be made by an executor, administrator or guardian, under an order of the Orphans' Court, and such executor, administrator, or guardian, shall be removed by the court, or shall die, or become insane, or otherwise incapable, before a conveyance is made to the purchaser, it shall be lawful for the succeeding administrator of the decedent, or for the successor in the guardianship, as the case may be, such succeeding administrator or guardian having given security to be approved of by the said court, for the faithful appropriation of the proceeds of such sale, to execute and deliver to the purchaser, a deed of conveyance, for the estate so sold, on the purchaser's full compliance with the terms and conditions of sale; but, if within three months after such sale, there shall be no such succeeding administrator, or guardian, having given security as aforesaid, it shall be the duty of the Orphans' Court, on petition of the purchaser, to direct the clerk of the court, to execute and deliver to the purchaser, the necessary deed of conveyance, on his full compliance with the terms and conditions of sale, paying into court the monies payable, and delivering to the clerk the securities required by the said terms and conditions; which monies and securities shall remain subject to the disposition of the court. Every deed, made in pursuance of, and agreeably to the provisions of this act, shall vest the property therein described, in the grantee, as fully and effectually, as if the same had been made by the persons, who may have sold any such estate circumstanced as aforesaid. The like proceedings may be had where an executor, administrator, or guardian, shall neglect or refuse to execute and deliver such deed for the space of thirty days after due notice of an order of the court requiring him to execute the same.

XXXVI. In all cases, where an application shall be made to any Orphans' Court, for a decree authorising the sale or mortgage of real estate, under any of the provisions contained in this act, the court may appoint suitable persons to investigate the facts of the case, and to report upon the expediency of granting the appli-

cation, and the amount to be raised by such sale or mortgage; and, upon such report being made, the court may decree accordingly.

XXXVII. In every case of a devise or bequest to a widow, which by force of any last will and testament, or by operation of law, will bar such widow of dower, subject to her right of election of dower, or of the property devised or bequeathed, it shall be lawful for the Orphans' Court, on the application of any person interested in the estate of the decedent, to issue a citation at any time after twelve months from the death of the testator, to any such widow, to appear at a certain time, not less than one month thereafter, in the said court, to make her election, either to accept such devise or bequest in lieu of dower, or to waive such devise or bequest, and to take her dower; of which election a record shall be made, which shall be conclusive on all parties. If the widow shall neglect or refuse to appear upon such citation, then, upon due proof to the court, of the service thereof, the said neglect or refusal shall be deemed an acceptance of the devise or bequest, and a bar of dower; of which a record shall be made, which shall be conclusive on all parties concerned.

XXXVIII. The Orphans' Court of the county where the real estate of a decedent is situate, shall have power, on the application of the widow, or any lineal descendants of the decedent, having an interest in such real estate, if of full age, or if under age, on the application of his guardian, to appoint seven or more persons, indifferently chosen, on behalf and with consent of the parties, or, where the parties cannot so agree, to award an inquest, to make partition of the real estate of such decedent, and upon the return made by the persons so appointed, or of the inquisition taken, to give judgment that the partition thereby made be firm and stable forever, and that the costs thereof be paid by the parties concerned.

XXXIX. When any such estate cannot be divided among the lineal descendants as aforesaid, or the widow and such lineal descendants, without prejudice to, or spoiling the whole, the said seven or more persons, or the said inquest, as the case may be, shall make and return a just appraisement thereof to the Orphans' Court; and thereupon, but not otherwise, the said court may order the same.

1st. To the eldest son, if he be living, but if he be dead, to his children, if any, in order of their birth, and prefering males to females, and in like manner to his other lineal descendants in the same order.

2d. If the eldest son or his lineal descendants do not accept the same, then to the second, and other sons, or their lineal descendants, successively, in the order of birth, in like manner, as is provided for the eldest son and his descendants.

3d. If the second or other sons, or their descendants, do not accept the same as aforesaid, then to the eldest daughter, or her

lineal descendants, in like manner as is provided in the case of the eldest son.

4th. If the eldest daughter, or her lineal descendants, do not accept the same, then to the second, and other daughters, or their lineal descendants, successively, in like manner, as is provided for the second and other sons.

In every such case, the party accepting the same, or some one on his behalf, paying to the other parties interested their proportionable parts of the value of such estate, according to the just appraisement thereof, made in manner aforesaid, or giving good security, by recognizance or otherwise, to the satisfaction of the court, for the payment thereof, with legal interest, in some reasonable time, not exceeding twelve months, as the court may direct; and the persons to whom, or for whose use, payment or satisfaction shall be so made, in any of the cases aforesaid, for their respective parts or shares of such real estate, shall be for ever barred of all right or title to the same.

XL. When equal partition in value cannot be made by the seven men appointed as aforesaid, or by the said inquest, they shall make a just appraisement of the respective purparts or shares, into which they may divide the estate; and thereupon the court may order the said purparts or shares, successively, to the persons entitled to make choice therefrom, in the order, and according to the rules, enacted in the preceding section, where the estate cannot conveniently be divided; and they shall award, that one or more purparts or shares shall be subject to the payment of such sum or sums of money, as shall be necessary to equalise the value of the said puraprts, according to the said appraisement thereof, which sum or sums of money shall be paid or secured to be paid, by the several persons accepting such purparts, in the manner prescribed in the foregoing section.

XLI. When such estate cannot conveniently be divided, into as many shares as there are parties entitled, the seven men appointed as aforesaid, or the said inquest, shall make a just appraisement of the respective purparts or shares, into which they may divide the estate; and, thereupon, the court may orde the shares, successively, to the parties entitled to make choice therefrom, in the order, and according to the rules, hereinbefore provided for the case, where the estate cannot conveniently be divided; they, or some one in their behalf, paying, or securing to be paid, to the other parties interested, their respective parts of the value thereof, in the manner prescribed as aforesaid.

XLII. In all cases of appraisement or partition, mentioned in the preceding section, the Orphans' Court shall, on application, grant a rule on all persons interested, to come into court, at a certain day, by them to be fixed, to accept or refuse the estate, or a share or portion thereof, as the case may be; and in case the party entitled to a choice, do not come into court in person, or by guardian or attorney duly constituted, or, in case he shall refuse the same, a record shall be made thereof; and the court may, and

shall, direct the same to be offered to the next in succession, according to the rules hereinbefore provided.

XLIII. Should the widow of the decedent be living, at the time of the partition, she shall not be entitled to payment of the sum at which her purport or share of the estate shall be valued; but the same, together with the interest thereof, shall be and remain charged upon the premises, if the whole be taken by one child or other decsendant of the deceased, or upon the respective shares, if divided as hereinbefore mentioned; and the legal interest thereof shall be annually, and regularly paid by the persons to whom such real estate shall be adjudged, their heirs or assigns holding the same, according to their respective portions, to the said widow, during her natural life, in lieu and full satisfaction of her dower at common law; and the same may be recovered by the widow, by distress or otherwise, as rents in this commonwealth are recoverable. On the death of the widow, the said principal sum shall be paid by the children, or other lineal descendants, to whom the said real estate shall have been adjudged, their heirs or assigns, holding the premises, to the persons thereunto legally entitled.

XLIV. Upon an appraisement or valuation of real estate, made as is hereinbefore provided, should all of the heirs neglect, after due notice, or refuse, to take the same at the valuation, the court shall, on the application of any one of the heirs, grant a rule upon the other heirs, and others interested, to show cause, why the estate so appraised, should not be sold; which rule shall be returnable at the next regular session of the court, or at such subsequent period as the court, having respect to the circumstances of the case, may direct; and notice of such rule shall be given in the manner provided in this act for other notices to heirs: On the return of such rule, the court may, on due proof of notice to all persons interested, make a decree, authorising and requiring the executor or administrator, as the case may be, to expose such real estate to public sale, at such time and place, and on such terms, as the court may decree: *Provided*, that the rule to show cause, herein directed, may be dispensed with, by the court, on the application of all the heirs, if of full age, and of the guardians of such as are minors for such decree: And notice of such sale shall be given by the executor or administrator in the manner provided in this act for other notices of sale.

XLV. Where a decree for the sale of real estate shall be made by the Orphans' Court, in the event provided for in the preceding section, the court shall direct that the share of the widow, if there be one, of the purchase money, shall remain in the hands of the purchaser, during the natural life of the widow; and the interest thereof shall be annually, and regularly, paid to her, by the purchaser, his heirs and assigns, holding the premises, to be recovered by distress or otherwise, as rents are recoverable in this commonwealth; which the said widow shall accept in full satisfaction of her dower in such premises; and at her decease, her share of the

purchase money shall be paid to the persons legally entitled thereto.

XLVI. When the lands, in respect to which application for partition shall be made to the Orphans' Court, as aforesaid, lie in one or more adjoining tracts, in different counties, it shall be lawful for the Orphans' Court of the county, in which the principal mansion is situate, or if there be no mansion or building on the lands, then, the court of the county in which the greater part of the land lies, on the application of any person interested, either to proceed by the appointment of seven or more men, agreed on by the parties, or to issue their writ to the sheriff of the county, within the jurisdiction of the court, specifying the lands, of which a partition or valuation is to be made; and, thereupon, the said sheriff shall summon an inquest to divide or value the said lands, in the same manner, as if the whole were within his proper bailiwick; and upon the return thereof, or upon the return of the seven or more men appointed by consent as aforesaid, the court may further proceed thereon, in all respects, as if all the said lands were in the proper county; and any recognisance taken in pursuance of such proceeding, shall be as effectual, to all intents and purposes, as if the lands bound by it were wholly within the county, where such recognisance is taken: *Provided*, that an exemplification of the proceedings which may be had, shall, within twenty days after the final decree therein, be dilivered to the clerk of the Orphans' Court of each county, in which the application shall not have been made and in which any part of the said lands are situate; which shall be entered on the records of such court, at the joint expense of all parties concerned.

XLVII. In any case, where one of the heirs of a decedent has elected to take the real estate of such decedent in one county, or any share thereof, if divided into shares, such heir shall not have the right of preference or election to take the real estate, or any share thereof, in any other county, or any other share in the same county, until all the other heirs shall have neglected, after due notice, or refused, to take the same at such valuation.

XLVIII. When the decedent leaves no lineal descendents, the like proceedings shall be had, in all respects, on the application of the persons, in whom the estate shall vest in possession: *Provided*, that if there be a life estate or life estates, with remainders over, such remainder men shall be made parties to the proceedings in partition, and shall have the right to accept or refuse the premises, at any valuation that may be made by seven men appointed as aforesaid, or by an inquest, in the same manner, as the lineal descendents of a decedent; such remainder men being bound by recognisance, or other sufficient security, according to the direction of the court, for the payment of the annual interest, to the tenant or tenants for life; and, thereupon, the court shall give judgment, that the partition so made between them, be and remain firm and stable forever, and that the costs thereof be paid by the parties concerned.

XLIX. When, upon any proceedings in the Orphans' Court, a sum of money shall be awarded by the court, for the share or portion, to which a married woman may be entitled, such money shall not be paid to her husband, until he shall have given security, to the satisfaction of the court, that the amount thereof, or so much thereof, as the court shall deem proper, be paid, after his death, to his wife, or if she shall not survive him, to her heirs, as if the same were real estate: Or, if the husband shall be unable, or refuse to give security as aforesaid, the same may be vested in trustees, to be approved by the court, for the same purposes, but reserving to the husband the interest thereof, during his life, unless the husband shall desire the same to be settled for the separate use of the wife.

Provided, always, that if the wife, being of full age, on a separate examination, the husband not being present, shall declare before one of the Judges of the same court, or, if not resident in the county, before a Judge of a Court of Record in the county, or place, where she may reside, that she does not require such monies to be so secured, and that she makes this declaration freely and voluntarily, without any threats or compulsion on the part of her husband, the full contents and legal effect of such declaration being first made known to her by the Judge, and the said declaration and acknowledgement be certified by the same Judge, and filed of record in the said Orphans' Court, then and in such case, the husband shall not be required to secure the said monies in manner aforesaid. The form of such declaration shall be as follows:

Whereas, I. A. B. the wife of C. B am entitled to the sum of proceeding from the sale (or partition) of the real estate of D. E. in the county Now I do certify and declare, that I consent and agree, that the same be paid to my husband, the said C. B. without any condition or security whatever. Witness my hand this day of &c.

The form of the certificate to be given by the Judge shall be as follows:

On the day of A. D. personally appeared before me, one of the Judges of the Orphans' Court, for the county of A. B. the wife of C. B. of *(here insert his residence and occupation)* who, being of full age, and by me examined, separate and apart from her said husband, and the contents and legal effect of the foregoing instrument by me fully explained and made known to her, declared that she executed the same freely and voluntarily, without any threats or compulsion, on the part of her husband, for any other person. Witness my hand and seal the day and year above written.

L. In all cases, where, in consequence of proceedings in partition, the share, or any part thereof, of an heir in real estate, shall be converted into money, either by reason of the impracticability or inequality of partition, or by virtue of a sale, or otherwise, the Orphans' Court, before making a final decree, confirming the partition or sale as aforesaid, may appoint a suitable person, as audi-

tor, to ascertain whether there are any liens, or other incumbrances on such real estate, affecting the interests of the parties; and if it shall appear by the report of such auditor, or otherwise, that there are such liens, the said court may order the amount of money which may be payable to any of the parties, against whom liens exist, to be paid into court, and shall have the like power as to the distribution thereof among lien creditors, or others, as is now exercised by the courts of common law, where money is paid into court, by sheriffs or coroners: And where recognizances or other security shall be given for the payment of money, the court may make an order on the party giving such recognizance, or other security, to pay the amount thereof into court, when the same shall become due, to be distributed in like manner, among the persons holding liens at the time of the partition.

LI. Where a recognizance hath heretofore been, or shall hereafter be taken, in any Orphans' Court, on the acceptance of the real estate of a decedent, at the valuation or appraisement thereof, as hereinbefore provided for, and the same or any part thereof, shall be satisfied, or paid to the person or persons interested therein, or his or their agent or attornies, any such person, so having received satisfaction of the amount coming to him, shall enter an acknowledgment thereof upon the record of such court; which shall be a satisfaction and discharge of the said recognizance, to the amount acknowledged to be paid; and the recognizance shall cease to be a lien on the real estate of the conusor, to a greater amount than the principal and interest actually remaining due.

LII. If any person, who shall have received satisfaction as aforesaid, for his claim or lien, secured by such recognizance, shall neglect or refuse to enter upon the record his acknowledgment thereof, upon the written request of the owner of the premises bound by such recognizance, or of any part thereof, or of his legal representatives, or other person interested therein, on tender of the costs and reasonable charges for entering such acknowledgment, within sixty days after such request and tender as aforesaid, such person, for every such default, shall forfeit and pay to the party aggrieved, the sum of fifty dollars, absolutely, and any further sum, not exceeding the amount by such person received, as shall be assessed by a jury, on a trial at law.

LIII. No sale of any real estate, whether by process of execution, or by order of any court on proceedings in partition, or otherwise, shall have the effect of divesting any lien or charge, constituted upon such estate, by virtue of this act, but such lien or charge shall continue to bind such estate, in the hands of the purchaser, his heirs and assigns; and the like remedies may be had, for the recovery of the principal sums so charged, and the annual interest, as if such sale had not taken place

LIV. In all cases, in which heirs, legatees or distributees are interested, and, in consequence of such interest, notice shall be required to be given to them, or any of them, of any proceedings

in the Orphans' Court, such notice shall, in all cases, be given in the manner following, except in the case of the accounts of executors, administrators, or collectors, and in other cases specially provided for, viz. To all persons resident within the county, in which the court has jurisdiction, or within forty miles of the place, where the court is holden, notice shall be given personally, or by writing left at their place of abode; to all persons resident without the county, but within the state, notice shall be given by advertisement in at least one newspaper, published at the seat of government of this state, and also, in at least one newspaper, published in the county, if there be one, so published, but if not, in at least one newspaper, published in an adjoining county; to all persons resident out of the state, notice shall be given by advertisement, in at least one newspaper, published in the city of Philadelphia, in addition to the public notice required in the case of persons within the state: And the period of time, during which notice shall be given, whether such notice shall be personal, by publication, or otherwise, shall be fixed by the court, according to the circumstances of the case, unless such period of notice be otherwise specially provided by law.

LV. In all cases, in which proceedings may be had in the Orphans' Court, affecting the interest of any minor, notice of such proceedings, shall be given to the guardian of such minor, if such guardian be resident within the county, or within forty miles of the seat of justice of the county, in the same manner, as is herein provided for, in the case of resident persons of full age. But if such minor, have no guardian, it shall be the duty of the party, making application to the Orphans' Court, to cause notice of such application to be given to the minor, if above the age fourteen years, or if under that age, to the next of kin of full age: *Provided*, such minor or such next of kin, be resident within the county, or within forty miles of the seat of justice thereof, and if, at the next session of the Orphans' Court, application shall not have been made on the part of such minor, praying for the appointment of a guardian, it shall be the duty of the court to appoint a suitable person as guardian, on whom notice shall be served in all cases, in which notice shall be requisite.

LVI. Whenever, by the provision of this act, it shall be lawful for the Orphans' Court to order the sale of real estate, public notice of such sale shall be given, by the executor, administrator, or guardian, as the case may be, at least twenty days, before the day appointed therefor, by advertisement in at least one newspaper, published in the county, if there be one, or, if there be none, then, in an adjoining county; and in all cases, notice shall also be given by handbills, affixed in at least three of the most public places, in the vicinity of such estate.

LVII. The Orphans' Court shall have power to send an issue to the Court of Common Pleas of the same county, for the trial of facts by a jury, whenever they shall deem it expedient so to do.

LVIII. The Orphans' Court, or any auditors appointed by them,

shall have power to examine, upon oath or affirmation, any of the parties, to any proceedings instituted in such court, respecting any matter in dispute, in such proceedings; and the said court shall have power to compel the production of any books, papers, or other documents, necessary to a just decision of the question before them, or before auditors.

LIX. The manner of proceeding in the Orphans' Court, to obtain the appearance of a person amenable to its jurisdiction, and to compel obedience to its orders and decrees, shall be as follows:

1. On the petition to the court, of any person interested, whether such interest be immediate or remote, setting forth facts necessary to give the court jurisdiction, the specific cause of complaint, and the relief desired, and supported by oath or affirmation, the Orphans' Court, or any judge thereof in vacation, may award a citation returnable at a day certain, not less than ten days after the issuing thereof.

2. Such citation may be served by the party obtaining the same, or by any authorised agent, or, if required by the party, it shall be served by the sheriff or coroner as the case may require, of the proper county.

3. The manner of such service shall be by giving a copy thereof to the defendant personally, or by leaving such copy with some member of his family at his last place of abode.

4. If the defendant be not found, and have no known dwelling place within the county, such citation may be served in like manner, upon the person or persons who may be the surety or sureties of such party, in any bond or recognizance given by him for the performance of any trust, or duty, in respect to which, such citation may have issued.

5. The return to a citation if made by the party on whose petition it issued, or his agent, as aforesaid, shall be on oath or affirmation; and in all cases of service, the return shall state how such citation was served.

6. If the party to be cited, cannot be found, and have no known dwelling place within this commonwealth, and there is no surety on whom service of the citation can be made as aforesaid, and the facts shall be so stated in the return, on oath or affirmation by the party complaining, or by some one competent to make affidavit in that behalf, the Orphans' Court may award another citation returnable in like manner with the first.

7. At the time of awarding such second citation, the court may make an order for publication of the same in two or more newspapers, to be designated by the court, in such place or places, and for such length of time as the court, having regard to the supposed place of residence of the defendant and other circumstances shall direct.

8. At the time appointed for the appearance of the defendant, should he not appear according to the requisition of the citation, and if due proof be made of the service thereof, or when service cannot be made, of the publication thereof, as hereinbefore pre-

scribed, the court may, with or without another citation, as justice may require, proceed to make such order or decree, in respect to the subject matter, as may be just and necessary.

9. It shall be lawful for the court, on such proof, to order that the petition of the complainant be taken as confessed, and to direct a reference to an auditor or auditors, to take proof of the facts and circumstances set forth in the petition, and to report thereon, and also to report an account against such defendant if necessary.

10. On the report of the auditor or auditors, the court shall make such order or decree thereon as may be just and necessary.

11. Compliance with any order or decree of the court may be enforced by attachment or sequestration; or, in case of a decree for the payment of money against a party who has appeared, the complainant may have a writ of execution in the nature of a writ of *fieri facias*, which writs may be allowed by the court, or by any judge thereof in vacation.

12. Writs of attachment and sequestration shall be directed to, and executed by the sheriff or coroner, as the case may require, of the proper county.

13. Writs of sequestration shall be in the following form:

The Commonwealth of Pennsylvania,
To the Sheriff of the county of Greeting:

Whereas, A. B. (here set out the decree or so much thereof as is material to explain the duty to be performed.) Therefore, We command you, that you do, at proper and convenient hours, in the day time, go to, and enter upon all the messuages, lands, tenements and real estate, of the said A. B. and that you do collect, take and get into your hands, not only the rents, issues and profits, of all his said real estates, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration, in your hands, and also that you attach all stocks, held by him in incorporated companies, and keep the same under attachment, until our said Orphans' Court shall make other order to the contrary; and you are to return with this writ an inventory or schedule of the property you have sequestered or attached, and a certificate under your hand, of the manner in which you shall have executed this writ, to our said court on the day of next.

Witness, &c.

14. A sequestration shall not abate by the death of the complainant or defendant.

15. It shall be the duty of the sheriff or coroner, as the case may be, immediately after receiving any such writ of sequestration, to file a copy thereof in the office of the prothonotary of the Court of Common Pleas of the same county; who shall forthwith enter the substance thereof on his docket, with the names of the parties; and the entry thereof shall thenceforward operate to charge the real estate of the defendant, according to the form and

effect of such writ; and shall bind the same in the hands of all purchasers, and mortgagees, subsequently to such entry without other notice: *Provided*, that if such sequestration shall be dissolved by the order of the Orphans' Court, the defendant, or any person interested in such real estate may have a certificate of the same from the clerk of the said court, which it shall be the duty of such clerk to furnish on application, and which, being entered on the docket, shall have the effect of a satisfaction of such lien.

16. Writs of *fieri facias*, shall be directed to and executed by the sheriff or coroner, as the case may require, of the proper county; and the proceedings thereon shall be the same, as on writs of *fieri facias* issued by the Court of Common Pleas of the same county.

17. When proof shall be made, on oath or affirmation, to the satisfaction of the court, if in session, or to any Judge thereof in vacation, at the time of filing a petition as aforesaid, that the defendent has absconded, or is about to abscond, or depart from his usual place of abode, to the prejudice of the complainant, it shall be lawful for the court, or for such Judge, to allow the issuing of a writ of attachment, or a writ of sequestration, or both, in the first instance, against such defendant; and, on the return thereof, the like proceedings may be had, as are authorised on the return of a citation.

18. If such attachment or sequestration, issued in the first instance, be executed, the court, or any Judge thereof in vacation, may dissolve the same, on the defendant giving security, to the satisfaction of the court, or of such Judge, to appear on a day certain, to answer to the petition, and to abide the orders and decrees of the court, in the premises.

19. When proof shall be made, on oath or affirmation, to the satisfaction of the court, or of any Judge thereof in vacation, at the time of presenting a petition, or at any stage of the cause, that the defendant therein named, has in possession, trust property or effects, which he is wasting, or otherwise disposing of, contrary to his duty, and trust, or that he is about to abscond, and carry such trust property or effects out of the jurisdiction of the court, it shall be lawful for the court, or such Judge in vacation, to award a writ in the name of the commonwealth to the sheriff or coroner, as the case may require, of the proper county, returnable on a day certain, to an Orphans' Court, to be convened for the purpose, if the said court shall not then be in session, commanding him to take possession of all such trust property and effects, specified in such writ; and to hold the same subject to the order of the court, and also to attach all debts due to such trust, whether by bond, mortgage or otherwise, and all stock in incorporated companies, and serve a copy of such writs upon each debtor, and upon each company, in which stock may be held belonging to the trust, as aforesaid: *Provided*, that before the execution of such writ, the sheriff or coroner, as the case may be, may require of the party,

at whose instance such writ may have been issued, sufficient security, to indemnify him against any damages, arising from the execution thereof: *And provided also*, that if the party, against whom such writ may issue, shall give sufficient security, to such sheriff or coroner, that the trust property or effects, specified in such writ, shall be forthcoming, at the return thereof, then such sheriff or coroner shall not execute the same, but shall make return of the facts to the court.

20. The like proceedings may be had, where the court has made a final order and decree, for the delivery of the trust property and effects, by the defendant, to any person, who may be designated by law, or by the order of the court to receive them.

21. On the return of such writ, the court may make such order, respecting the disposition of such trust property and effects, as may be necessary and proper, according to the principles of justice and equity.

22. When a decree shall have been had, against any defendant, who shall not have appeared, according to the requisitions of the citation, and a sequestration shall have issued, against the real or personal estate of such defendant, the court may order the decree to be satisfied, out of the estate and effects sequestered: *Provided*, that such order shall not be carried into execution until the complainant shall have given security, to the satisfaction of the court, to abide the order of the court, touching the restitution of what he may have received, in case the defendant shall appear, and be admitted to defend the suit; but if such security shall not be given, the estate and effects sequestered, or the proceeds thereof, shall remain subject to the directions of the court to abide its further order.

23. If the defendant, against whom such decree shall have been made, or his representatives, shall within one year after personal notice of such decree, and within five years after the entry thereof, when no such notice shall have been given, present a petition to the same court, praying to be admitted to be heard, and shall pay such costs, as the court shall adjudge, the party so petitioning, shall be admitted to a defence; and the case shall then proceed, in like manner as if such defendant had appeared in due season, and no decree had been made.

24. If such defendant, or his representatives, shall not, within such period, present a petition, as aforesaid, the court may make such final order and decree, both in respect to any estate or effects that may have been sequestered, and in respect to the matters in controversy in the case, as may be according to justice and equity; and may, if necessary, award a writ, in the nature of a *fieri facias* in the manner hereinbefore provided, in the case where the defendant appears.

25. When any executor, administrator, collector or guardian, shall reside, or remove, out of the county, in which his appointment shall have taken place, or shall not possess real or personal

estate in such county, sufficient to satisfy any decree or order of the Orphans' Court of such county, it shall be lawful for the Orphans' Court of such county, to issue process, to the county in which such executor, administrator, collector, or guardian may be, or in which he may have any real or personal estate, amenable to such process; and such process shall be executed by the sheriff, or coroner, as the case may require, of the county, in which such executor, administrator, collector, or guardian may be, or may possess real or personal estate as aforesaid.

LX. The several Orphans' Courts shall have power to fix the return days of all process, issuing out of the respective courts whenever such return days are not otherwise provided for by law, and, from time to time, to make rules, for the regulation of the practice of such court, not inconsistent with this act.

LXI. Any person, aggrieved by a definitive sentence, or decree of the Orphans' Court, may appeal from the same, to the Supreme Court: *Provided*, that the party appealing shall give security, by recognizance, with sufficient surety, in the Orphans' Court, or before one of the judges thereof, conditioned to prosecute such appeal with effect, and to pay all costs that may be adjudged against him; and shall make oath or affirmation, that the appeal is not intended for delay; which appeal thenceforth shall stay all proceedings in the Orphans' Court, until the same be determined in the Supreme Court, and the record be remitted to the Orphans' Court: No appeal shall be allowed, unless the same be entered, and security given within three years after the final decree of the Orphans' Court: *And provided*, that no reversal or modification of any decree or proceedings of the Orphans' Court for the sale of real estate, shall have the effect of divesting any estate or interest acquired under such decree, or proceedings by persons not party thereto, where the Orphans' Court had jurisdiction of the case.

LXII. The fees to be taken by the sheriff of each county, for the service enjoined by this act, shall be the same, as those already allowed for like services: And for executing a writ of sequestration, the same fees shall be allowed, as upon a writ of foreign attachment, together with reasonable costs and expenses according to the discretion of the court: On all writs and process sent from another county, no mileage shall be allowed, except for the distance actually travelled; but an allowance shall be made, for the transmission of such writs and process, to the clerks of the court, from which they may have issued, at the common rates of postage.

Contents

OF THE SEVERAL SECTIONS OF THIS BILL.

No. 5.

Remarks

UPON THE BILL RELATING TO ORPHANS' COURTS.

SECTION I. We have incorporated in this section, the provision of the constitution respecting the Orphans' Court, (article V. section 7,) and the substance of the 23d section of the act of 24th February, 1806, (*Purdon's Digest*, p. 616,) so far as it requires the presence of the president of the court, departing slightly from the phraseology of the act, in order to make this passage conform in terms to the constitution.

SECTION II. The first sentence of this section, is to be found substantially, in the first section of the act of 27th of March, 1713; (*Purdon*, 610,) where the Orphans' Court is denominated "a Court of Record."

The last sentence is new in terms, and as a positive enactment. We have endeavoured in this section to settle a question, which has been the source of great litigation in our courts, and perhaps more than any other question, has been fruitful of contradictory decisions.

The expressions of the act of 1713, which we have quoted, are well understood in the law, and import, among other things, that its judgments are to be received as conclusive of all matters decided by them, until reversed by a higher tribunal, in the manner directed by law. Such is the character, and such the effect, of the judgments of the District Courts, Courts of Common Pleas, and other courts of record in this commonwealth; and it is even held that the judgment of a justice of the peace in a civil suit before him, although not holding a court of record, technically speaking, is conclusive when not appealed from. Notwithstanding these general rules respecting courts of record, which would seem to apply to the Orphans' Court as well as to the Courts of Common Pleas at least, since the same judges constitute both tribunals, the Supreme Court decided in an early case, (*Marriott* v. *Davy*, 1st *Dallas' Reports*, 164.) that the settlement of an account of an executor was not conclusive as against legatees, who might nevertheless require a re-examination of it, in an action in the courts of common law. A similar decision took place in the year 1818, in the case of an action to recover a distributive share of the estate of a decedent. (*Kohr* v. *Fedderhoff*, 4th *Serg. & Rawle*, 248.)

Several other cases are to be found in our books, in which decrees of the Orphans' Courts have been examined collaterally, by other courts, out of the due course of appeal.

On the other hand, many decisions have taken place, which seem to import that proceedings in the Orphans' Courts, in matters within their jurisdiction, cannot be questioned, except on an appeal to the Supreme Court, within the time prescribed by law.

It is not difficult to understand why this discrepancy of doctrine exists. In the courts of common law the proceedings are almost always between known parties, who are named on the record, and have express notice to appear, and to take care of their interests.

In the case of minors it is an established rule that no judgment is effectual to bind them, unless they appear by guardian or next friend; and where, as in the case of a foreign attachment, those courts allow proceedings against the property of the absent, it is with great deliberation, and not until after ample time is given for information to the party affected. The peculiar character, however, of the jurisdiction of the Orphans' Court renders its operation upon the persons interested in its proceedings materially different. In the case, for example, of the settlement of an administration account, the parties interested are the executor, or administrator on the one hand, and on the other distributees, legatees, or creditors, as the case may be, many of whom may be, and often are unknown, and others are minors, or residents of another state, or of a foreign country. Under such circumstances, notice cannot be given as in the courts of common law, personally, or by a written summons left at the dwelling house of the party; and no other mode seems practicable in general, than that of advertisement in the public newspapers, for a certain period of time, however insufficient this kind of notice undoubtedly is in many instances. When therefore, cases have arisen, in which it has manifestly appeared, that the interests of parties have been affected, by proceedings in the Orphans' Court, of which they have had no manner of notice, the common law courts, moved by the hardship of the particular case, have endeavoured to set right the proceedings, and given the party complaining an opportunity of being heard. On the other hand, the inconveniences of overhauling the decrees of the Orphans' Courts, in a collateral proceeding, are so obvious, and of so serious a character, that in other cases the courts have refused to interfere with the maxim, paramount as to all other tribunals, that every thing must be presumed to be correctly and justly done, in a court of record. That there are difficulties in every view of the subject, we are free to admit; but it is abundantly evident to us, that the weight of reason and convenience is on the side of the conclusiveness of the decrees of the Orphans' Courts. If it be right, that all persons should have notice of the proceedings, by which their interests are affected, it is no less right and proper that persons who stand in the responsible, and often laborious situation of executors, or administrators, should be protected in the honest discharge of their duties. If it be right that the interests of minors should be guarded, and their property secured from spoliation, and injury, it is equally just that creditors should have the means of recovering their debts, by the sale of the real estate of their deceased debtor. In the one case, however, no executor or administrator would be safe, if after the lapse of time, and the loss of vouchers, he might be subjected to the re-examination of his ac-

counts, by an action in the common law courts; and, in the other example put, no one would become the purchaser of real estate sold under an order of the Orphans' Court, if at any subsequent time, he was liable to an action of ejectment at the suit of one of the parties interested, on the ground of a defect of notice of the proceedings, under which the sale took place. However desirable, therefore, it would be, to reach every one interested, with sufficient notice of the proceedings of the Orphans' Courts, it is not we believe, within the compass of human ingenuity, to devise general rules, which shall be sufficient for the purpose; and it appears to us to be one of those cases, in which particular convenience must give way to the general advantage.

We propose, therefore, in this section, by an express enactment, to put the decrees of the Orphans' Court on the same footing with the judgements of the other courts, and of the justices of the peace, so far as regards their conclusive effect. We are aware, however, that a provision, which embraces all proceedings in the Orphans' Court, requires, to render it just to all parties, that every effort shall be made to secure due notice of such proceedings; and we have endeavored in several of the subsequent sections to provide for this important object. These provisions will be the subject of remark in their order. It may be sufficient to observe at present, that, besides the suggestion of some general rules providing for public notice, in all cases of persons resident out of the county or state, and for actual notice and the appointment of guardians, in all cases where minors are interested, we propose to extend the period allowed for an appeal to the Supreme Court, to the term of three years. With these checks and guards against possible abuse in the proceedings of the Orphans' Court, we respectfully submit that it will be expedient to provide for the conclusiveness of its decrees in the manner proposed in this section.

It is proper to remark, however, that the provision does not apply to the court in which the decrees are made, and that it is not intended to make any alteration of the present law, in respect to the power of the court over its own proceedings. Cases may arise, in which, to prevent manifest injustice, the court *in which* an account was settled, may allow it to be opened, even after the lapse of a considerable period of time, according to the doctrine and practice of Courts of Equity; but the power we think should be left to that court and will doubtless be exercised with great caution.

Section III. This section is copied, with a slight change of phraseology, from the 23d section of the act of 24th February, 1806; (*Purdon*, 616,) and contains the substance of all the existing provisions regulating the periods of holding the court.

Section 4. In this section, we have endeavored to comprise all the subjects of the jurisdiction of the Orphans' Court, as we find them enumerated in various acts of Assembly. We beleive that they are all embraced in this section, in general terms; the particulars of the jurisdiction, and the manner of exercising it, being

set forth in the succeding sections. In the last clause of the first paragraph, the expressions used are those of the 1st section of the act of 1713; which we have retained, although the phraseology might be improved; inasmuch as those expressions have acquired a determinate meaning, which might be hazarded by a change.—We have, however, omitted the word "*Tutors*," in the enumeration of persons within the jurisdiction of the court; a term derived from the civil law, but not employed in the same sense in our present language.

Section V. The substance of the first clause of this section and the proviso following, are to be found in the 7th and 12th sections of the act of 1713, (*Purdon* 612, 13.) We have thought it best to specify the jurisdiction, as we believe it has generally been exercised, viz: over the persons of minors resident *within the county*, to avoid any conflict of authorities; and we have provided expressly in the last clause of the section, that the authority of the guardian shall be the same in all parts of the state. We have omitted the clause of the *seventh* section of the act of 1713, which empowers the court "to order and direct the binding or putting out of minors apprentices to trades, husbandry or other employment," because it is believed to be obsolete in practice, and of very doubtful utility; and we propose in a future bill relating to guardians, to suggest what appears to us a preferable mode of attaining the same object.

Section VI. The provisions of this section are new to our law, but they exist in the codes of some of our sister states, and we submit that the interests of minors will be promoted by confining the office of guardian to such persons as are likely to exercise a due supervision of the accounts of the executor or administrator. It will be perceived that it is not intended to interfere with the power of a parent to appoint by will whomsoever he may choose as guardian of his minor children.

Section VII. This section is also new to our laws; but, like the preceding, similar to the provisions of other states. It is believed that there is no state of this Union, which admits the authority of a guardian, constituted or appointed in this state. In the remarks on the bill relating to registers, we have stated our reasons for limiting the authority of foreign executors and administrators in this state; and we refer to those reasons, as applying in all respects to the case of a guardian. The considerations in the latter case appear to us even strange; inasmuch as a guardian has a certain authority over the *person* of his ward, which ought not to be exercised in this state, unless the authority be derived from the acts of our own tribunals.

Section VIII. This section is similar in terms and substance to the first section of the act of 30th March, 1821. (*Purdon*, 618.) The last clause of that section, however has been omitted; it relating properly to the duties of executors and administrators; and will be introduced into the appropriate bill.

The proviso added to this section is new, but we conceive of

manifest propriety. Minors are peculiarly objects of legislative care and protection, and have always been considered entitled to every kind of remedy in the power of the law to obtain redress from unfaithful guardians. The Orphans' Court is undoubtedly the proper tribunal for the settlement of a guardian's accounts, in all matters properly belonging to his trust; but cases have arisen of contracts between a guardian and his ward, not necessarily connected with their relative characters as such, in which the remedy may be more properly sought in the common law tribunals. Such was the case of Denison *v.* Cornwell, (*17th Serg & Rawle*, 374,) in which the Supreme Court of this State held, that if a ward could recover of a guardian for work and labour done for him during his minority, it could only be through the medium of the Orphans' Court. With the greatest respect for that tribunal, we submit that the powers of the Orphans' Court are entirely inadeqate and unsuited to the administration of justice in such cases, and that it will greatly promote the convenience both of the guardian and of the ward, to pursue the usual course in respect to such claims. The object of the proviso, therefore, is to leave the common law remedy of the ward unaffected by an express enactment of this bill; which under the act of 21st of March, 1806, (*Purdon*, 2,) might be construed to interfere with it.

Section IX. This section is entirely new. We conceive that the utility of the provision requiring the guardian to file an inventory, is too obvious to require remark. It will be sufficient to observe that, besides furnishing a measure for ascertaining or correcting the amount of security given by the guardian, it will be serviceable as a check upon the guardian, and a guide to the minor or his representatives and the court in the settlement of the accounts.

Section X. The first clause of this section is copied from the first clause of the 3d section of the act of 30th March, 1821. (*Purdon*, 619.) The remainder is new. In the case of Bowman *v.* Herr, (*1st Pennsylvania Reports*, p. 282.) the Supreme Court decided that the triennial settlement of accounts made by a guardian, in pursuance of the act of 1821, is not conclusive upon the ward, but may be impeached upon the final settlement of the accounts, when the ward arrives at full age. In conformity with this decision, which appears to us to be entirely consistent with the act of 1821, and the principles of the law of minors, we have provided that the partial accounts shall be filed in the office of the clerk of the court, for the inspection of all parties, and that a full and complete account, embracing all the partial settlements, shall be settled in the register's office, when the ward arrives at full age; which, when confirmed by the Court, shall be conclusive upon all parties, unless reversed, modified or altered on appeal. By these provisions we submit that the interests both of the guardian and of the ward may be sufficiently protected.

Section XI. The 4th section of the act of 30th March, 1821, (*Purdon* 619,) contains most of the provisions of this section:

We have added a clause, however, which we conceive to be essential to the safe guard of minors, viz: the proviso that a guardian shall not be discharged from his liability for the estate of the ward, until after a report of auditors shall have been duly made on his accounts, and the same be confirmed by the court: We believe this to be the practice in some of the counties of this state; and we respectfully suggest, that it ought to be uniform and imperative. The mere rendering of an account by a guardian; which is usually filed in the office, without examination, and sometimes without notice to the minor or any one acting for him, will be of little avail to the minor; and it is obviously impracticable for the court to examine, personally, into the details of an account which may be of several years standing, and composed of a multitude of items. We conceive that by referring all such accounts to auditors, who act as the clerks of the court, and by requiring, as we propose in a subsequent section, that notice shall in all such cases be given to the minor and his next of kin, the means and opportunity will be afforded of taking such exceptions to the guardians' accounts, as the interests of justice require. And we may be permitted to remark in addition, that a mere statement of the guardian's account will often furnish but an inadequate test of his duties and responsibilities. In this, as in other branches of moral duty, there may be errors of omission, as well as of positive commission for which the party may be justly chargeable. To take a single, and sufficiently familiar example: A guardian may render an account to the Orphans' Court, containing entries of various receipts of money and payments of various sums, the items of which may all be duly vouched; and on the face of the account every thing may appear fair and honest. The same guardian, however, may have received other, and perhaps large sums of money, on behalf of his ward, to which no clue can be furnished by the accounts filed; nor can the court, supposing that the necessary attention to their other duties would leave them sufficient leisure to examine such accounts in detail, possess the means of determining whether such omissions had occurred. By a reference, however, to auditors; who will take care to bring all parties before them, and who, by a provision we have suggested in another part of this bill, may have the power to examine the accountant on oath or affirmation, and to require the production of books and papers, the truth will in all probability be discovered, and latent as well as obvious defects corrected.

The last clause of the 3d section of the act of 1821, authorising the court to take bond with security from the person or persons to whom the estate of the minor may be surrendered, is omitted here, being provided for in a subsequent section. (section xiv.)

Section XII. This section contains, substantially, the same provisions as are to be found in the last clause or branch of the 3d section of the act of 30th March, 1821. *(Purdon* 619.*)*

Section XIII. This section is new. The expediency of some provisions of the nature suggested in it, appears to us sufficiently

manifest. Although cases may not frequently occur in which the interference of the court may be called for, yet such cases have arisen, in consequence of differences of opinion between the widow and guardian; and it would seem proper to provide a remedy for this, and other cases not at present within the jurisdiction of the court.

Section XIV. The provisions of this section are also new to our law, although like most others that we have suggested, to be found in the codes of other states. It frequently happens that minors possessed of some property, are for a time without a guardian and without the opportunity of obtaining a suitable one, and cases sometimes occur in which it is of the utmost importance to the interests of a minor, that there should be a competent person to take charge of his property; as in the case mentioned in section XII, preceding, where a guardian is removed for misconduct.

We are not aware of any objections to this provision, that are not counterbalanced by advantages. We have provided that the receiver shall give security for the due performance of his duties; which will of course cease on the appointment of a regular guardian.

Section XV. This section is copied almost literally from the act of 18th February, 1824, *(Purdon* 620,) except that we have authorised the investment of the surplus income of real estate, as well as the principal and interest of the personal; similar reasons existing in both cases.

Section XVI. This section is new in terms; though in principle it may be supposed already to exist in those provisions of the present law, which direct the manner of giving notice of the settlement of accounts of executors, administrators and others. We have supposed that it would be proper to require, expressly, that it should be made to appear on the presentation of the accounts to the Orphans' Court, that the notice required by law had been given.

Section XVII. This section is also new as a general provision, and may be considered to require some particular explanation.

The accounts of executors administrators and other trustees, constitute one of the most important subjects of the jurisdiction of the Orphans' Court; and from the number and variety of the parties, whose interests may be involved in them, are as we have already intimated, the source of the principal difficulties in regard to the conclusiveness of the decrees. To protect fair and honest trustees on the one hand, and on the other to guard the interests of the young and the absent, must be the object of legislation on this point. By the existing law, executors and administrators are required to settle their accounts in the register's office; which, in practice, amounts to no more than the mere vouching of the items of the account; and, from the limited powers and jurisdiction of the register, can never greatly exceed this. The account, or a copy of it, is then transferred to the Orphans' Court; where it is supposed to undergo some examination by the court; since the law

speaks of its "confirmation and allowance." Such examination, however, in point of fact seldom takes place; and in many counties cannot well take place, in consequence of the pressure of other duties. To obtain that examination, therefore, which seems necessary for the purposes of justice, there must in such cases, be a reference of the accounts to competent persons, skilled in the matter of accounts, and acquainted at the same time, with the general rules of law; by whom the justice of the items of charge and discharge may be investigated, out of court. In many parts of the state, it is the practice, at present, to refer all disputed accounts to auditors. We propose to require that this shall take place in all cases, unless the parties otherwise agree. According to the present law and practice, if the parties interested are absent, or incompetent by reason of infancy, or otherwise, to make application to the court, the accounts are confirmed as a matter of course, and the executor or administrator so far discharged. The mode suggested will add to the checks upon the accountant; even if the parties interested should not appear before the auditors, and will give them additional time for appearance, and greatly increased facilities for inquiry and examination.

We have in conformity with an existing provision, in relation to the accounts of assignees, proposed that the auditors should be sworn or affirmed to perform their duties with fidelity, and that they should have the power of administering oaths and affirmations to others.

Section XVIII. The first clause of this section is copied, with a slight variation of phraseology, from the 6th section of the act of the 27th of March, 1713, (*Purdon* 612,) with the omission however of the words "guardian or trustee." We conceive that the provision cannot be applied with propriety to either guardian or trustees, inasmuch as *they* are liable for interest upon entirely different principles, and not merely after the period when their accounts "are or ought to be settled." In the succeeding section, we have made provision for the case of guardians, by authorising the court to determine the amount of interest to be paid by them, according to the circumstances of the case.

The proviso at the end of this section is new; but appeared to us necessary as an explanation of the first clause. By the present law and practice, executors and administrators are allowed the period of one year after the death of their testator or intestate, for the settlement of their respective accounts; and, during that period, they are not chargeable with interest, upon the funds of the estate, lying in their hands. This appears to us to be perfectly just and fair, for all parties, because during the year, the executor or administrator is liable to constant demands on the part of creditors, and must keep the funds of the estate disengaged to meet them. But we conceive that if an executor actually *makes* interest during that period, he ought to account for it, precisely as if it were made after the year; and, upon the same principle, if he makes use of the money for his own purposes, he ought to pay

interest for it. In England, where executors and administrators receive no compensation for their services in the shape of commissions, the courts may be disposed to allow them the use of certain sums of money of the estate, without charge, as a measure of remuneration; but here, we submit, where those trustees receive a sufficient stated compensation, they should be held accountable for all that they make out of the estate beyond that.

We do not mean to assert that the law is not so held, generally, in this state; but we have suggested this proviso for the purpose of settling the question extensively and definitely.

Section XIX. The provisions of this section are new to our law, but the principle is familiar in the courts of equity. The liability of executors and other trustees to the payment of interest, where they have failed to settle their accounts, or to perform the duties of their trust, in regard to investment, or the payment of the fund to those entitled, is well settled in all our courts, and the law frequently enforced.

The non performance of a duty, however, may, it is obvious, arise from various causes; and the shades may be numerous between simple neglect and gross fraud, on the part of the executor or other trustee. According to the prevailing practice, however, of our courts, no distinction is made in visiting interest upon such defaulting trustees; and, with very few exceptions, the legal rate of interest or six per cent. is uniformly charged. The courts of equity, however, recognize the distinction between negligence and corruption in the conduct of trustees, and measure the rate of interest accordingly. It seems peculiarly fitting that our courts should possess similar power, at the present time, when the market rate of interest is so much below the legal rate, and when the consequence of charging the legal rate in the case of mere *negligence*, would be to compel payment by a trustee, of what he could not in the ordinary course of things have received; and to give to those interested a profit on their funds, which they could not easily have made by the usual mode of investment.

For these reasons, we respectfully submit that the provision suggested will be found to contain a convenient addition to the powers already possessed by the Orphans' Court.

Section XX. This section is nearly a literal transcript of the last clause of the 14th section of the act of 19th April, 1794 *(Purdon 376)* The first part of that section, which enumerates some of the duties of executors and administrators will be hereafter incorporated with the act providing for those officers.

We have made an alteration, however, in respect to the extent of public notice to be given by executors and administrators, which we think imperatively called for. The act of 1794 provides that notice shall be given "*in one or more of the public newspapers of this state;*" a provision which seems to us far too vague for the purposes of justice; inasmuch as the requisition would be complied with, and the creditor barred, if an executor were to advertise in the county, most remote from the residence of the decedent, and

of the creditor. We have, therefore, suggested the amendment in the text; which directs publication to be made in the same manner as in other cases, viz: by advertisement in one or more newspapers of the county, where letters testamentary or of administration were granted.

Section XXI. The provisions of this section are new, so far as they provide for additional notice, in all cases of the settlement of accounts, or of the distribution of the assets, or surplusage of an estate, where the interests of justice require it. The act of the 13th of March 1815, (*Purdon* 386) provides for the case of heirs residing out of the state, who may have been advanced by the decedent in his lifetime, by requiring a certain degree of public notice; and the same principle seems to us to apply to other cases, in which heirs, legatees, distributees or creditors reside out of this state. The object of the section is, simply, to authorise the court to require additional notice to be given, if they shall think it necessary; a power we think necessary and proper to be vested in the court, and not likely to be exercised to the prejudice of honest executors or other trustees.

Section XXII. This section is, subtantially the same, as the first paragraph of the 3d section of the act of 4th April, 1797. (*Purdon* 615.) The last paragraph of that section is incorporated with the XIXth section of the bill relating to registers and registers' courts.

Section XXIII—XXIX. In this section we have brought together, certain provisions to be found in the 3d section of the act of 27th March, 1713, (*Purdon* 611,) in the 1st section of the act of 4th April, 1797, (*Purdon* 614,) and in the 2d section of the act of the 30th March, 1821, (*Purdon* 618,) and in this and the six succeeding sections, we have endeavoured to provide for all the cases, in which, by reason of delinquency, intellectual or moral incapacity, removal, or other causes, an executor, administrator, collector, or guardian, has become incompetent, or unfit for his station. The provisions of the existing law are retained as far as they go; and we have added to the cases of delinquency and removal, those of lunacy and habitual drunkenness; conceiving that such cases were equally within the principle, which dictated the existing law. We have endeavoured to suggest a mode of proceeding, which while it will give a speedy and certain remedy in cases requiring dispatch, will not operate oppressively towards the executor or other trustee. In the 25th section, we have authorised the court to award a writ to enforce their order for the surrender of the trust property by a delinquent executor, administrator, collector, or guardian. Our reasons for the introduction of this species of process into the practice of the Orphans' Court, will be stated in our remarks on the section relating to process. It will be perceived that we have carefully distinguished the case of *delinquent* executors, &c. from that of mere incapacity or removal, in respect to the mode of proceeding against them. In the 26th section, relating to the case of an executrix who marries again, we

have retained the phraseology of the act of 1713, although it is somewhat antiquated, rather than to hazard any thing by a change of expressions.

In the 29th section, we have provided that relief may be given on the application of a surety, in the cases provided for, in the preceding sections. The substance of this section, also is to be found in the 1st section of the act of 1797, (*Purdon* 614.) and in the act of 30th March, 1821, (*Purdon* 618,) with an addition requiring the surety, in the event of any part of the estate being delivered to him, by the order of the court, to give sufficient security, faithfully to preserve and account for the same; a provision we conceive of manifest propriety.

Section XXX. The first paragraph of this section, is copied from the 2d section of the act of 1st April, 1823, (*Purdon* 619, 20.) with some verbal alterations, and the addition of the words, "other accountants," so as to embrace all classes of trustees. The proviso, which has been added by us, appears to us necessary to preserve the symmetry of our law, with respect to judgments. We have endeavoured also, in this proviso, to meet the case of an appeal to the Supreme Court; in consequence of which the amount of the balance may be enlarged or diminished.

Section XXXI. This section is entirely new. The utility of such a provision, its harmony with other provisions of the law relating to the satisfaction of liens, and its propriety as a measure of justice towards executors and other trustees, whose property might otherwise be encumbered by perpetual liens, furnish, it appears to us, abundant reasons for its adoption.

Section XXXII. In this section, we have collected together all the existing provisions which give jurisdiction to the Orphans' Court, to authorise a sale of real estate, by an executor, administrator or guardian, enumerating the cases.

1st. The case first provided for it is to be found in the 19th section of the act of April 1794, (*Purdon*, 377,) as amended by the first section of the act of 8th April, 1826, (*Pamphlet Laws*, *p.* 255,) with some alterations of phraseology. The only substantial variation consists in the omission of the latter part of the 19th section of the act of April 1794, which authorises a sale of real estate, for the purposes of putting the children apprentices, and of improving the residue of the estate to their advantage. We consider both of these objects to be out of the proper sphere of the duties of executors and administrators, and the power liable to great abuse. We have in the third clause of this section, proposed to transfer the power of sale for the improvement of other parts of the estate to the guardian, by whom, it appears to us, that it can be most safely and beneficially exercised.

2d. The case provided for in the second place, is that stated in the 2d section of the act of 1st April, 1811, (*Purdon*, 617.)—The last clause of that section, which authorises the court to decree what contribution should be made by heirs towards the payment of the debts of the testator, has been omitted in this place,

because it appears to us to be an application to a particular case, of what we conceive to be a general power of the Orphans' Court, derived from its jurisdiction over the subject matter.

3d. The case provided for in the third place is the same in substance, as that in which the 10th section of the act of 7th April, 1807, (*Purdon*, 617,) gives the court power to order a sale.

Section XXXIII. In this section we have suggested a mode of proceeding on the application of an executor, administrator or guardian, for the sale of real estate, somewhat different from the present, and requiring some explanation. As the law now stands, it is believed that in all cases, excepting the second case mentioned in the preceding section, it is necessary that application for an order of the sale should be made to the Orphans' Court of the county where the real estate is situated. In the second case, however, the act of 1811, seems to give authority to the court, in which the accounts have been settled, to order a sale of real estate, in any part of the commonwealth. This, it appears to us, is contrary to the principles and analogies of our judiciary system, which, except in certain very special cases, limits the jurisdiction of the several courts to the boundaries of their respective counties. At the same time there seems to be strong reasons, for giving the power of determining upon the propriety of a sale to the court, in which the accounts are to be settled, and to which the executor or other trustee is accountable. If the application is to be made in each county in which real estate happens to lie, and the executor is bound to go through all the formalities that the law must necessarily require on each application, including the giving security, which an executor residing at a distance may find very onerous, the inconveniences may be so great, as to prevent a fair and honest trustee from making the application; while at the same time the circumstance of the Orphans' Courts being distinct tribunals, generally ignorant of the proceedings of each other, would enable a fraudulent trustee to obtain orders of sale, in cases where no actual necessity exist, and to possess himself of the funds of the estate. We have endeavoured, therefore, to avoid these difficulties, by suggesting a mode of proceeding, to which there do not appear to us any serious objections.

Where the estate lies in the same county, in which the Orphans' Court, having jurisdiction of the accounts of the applicant, is held, the court has authority to order the sale of such part or so much as to *them* shall appear necessary.

Where the real estate is situated in another county or counties, we propose that application shall be made, in the first instance, to the court, to which the executor is accountable, (which will usually be in the county of his residence) accompanied by the necessary forms, and evidence, as required in the next succeeding section, and, thereupon, that court, being satisfied of the expediency of a sale or mortgage of some part of the estate, may authorise the executor to raise so much money, as may be necessary, from real estate, situated out of the county. Then we propose that the

agency of the Orphans' Court of the county in which the land lies, shall commence. The decree of the first Orphans' Court having ascertained the amount proper to be raised, as well as the necessity of raising it, and having designated the county or counties, in which it may be proper to sell, the duty of the latter Orphans' Court will be to make an order for the sale or mortgage accordingly as they shall think it expedient, of such parts of the real estate within their county, as in their opinion may be proper; and the executor is to make report of his proceedings in respect to the sale to the same court.

It appears to us that by this mode of proceeding, the convenience of all parties interested in the estate will be consulted, and the territorial jurisdiction of the several Orphans' Courts preserved.

Section XXXIV. The several documents and evidence required by this section to be furnished by an executor, administrator or guardian, before he can obtain an order of sale, are the same as required by the present law, with the addition of a statement of all the *real* estate of the decedent or minor, as the case may be; a provision which will enable the court to decide with better information upon the quantum and locality of the lands to be sold.

The last proviso in this section is copied literally from the 20th section of the act of 1794. *(Purdon, 378.)*

Section XXXV. This section is derived from the act of 2d April, 1802, *(Purdon, 382,)* with certain additions, which appeared to us requisite. We have in the first place added *executors* and *guardians* to *administrators*, conceiving that the same necessity exists, where an *executor* or *guardian* dies after making a sale, without having executed a conveyance, as in the case of administrator. Upon the same principle, we have provided for the want of the *dismissal*, *lunacy* or other incapacity of the executor, administrator and guardian. We have also provided for an obvious defect in the present law, by requiring that the succeeding administrator or guardian shall give security for the faithful appropriation of the proceeds of the sale, and that the deed shall be delivered only on the purchasers compliance with the terms of sale.

We have substituted the *Clerk of the Court* for the *Sheriff*, as the officer to execute the deed in the case mentioned in the third section of the act, conceiving that as he is entrusted with the record, and conversant with the circumstances of the case, he is the most proper person to conclude the proceeding.

Section XXXVI. This section conveys an authority to the several Orphans' Courts to appoint commissioners to enquire and report upon the expediency of granting applications for the sale of real estate. In some counties, it is believed to be the present practice to make such references, where the facts cannot be conveniently ascertained by the court itself. We think it highly desirable that such power should be expressly granted, if there be a doubt, any where, of its existence; and that it should be freely

exercised wherever any question can be made of the expediency of granting such applications. We have reason to believe that great abuses have been practised by the facility with which orders of sale have been granted on the petition of an executor, administrator or guardian; more especially with respect to the amount of real estate sold. The opportunity has been taken of a real or apparent deficiency of personal estate, to obtain an order for the sale of the whole or a large part of the real estate of a decedent or minor; whereas if an inquiry had been directed through the medium of an auditor, who would have summoned all parties before him, the facts stated in the application might have borne a very different aspect, or, at all events, a portion of the real estate might have been preserved for the heirs or persons entitled. The proceedings in our Orphans' Courts, on an application for a sale, are believed to be generally *exparte;* no notice being usually given to the persons interested in the proposed application. We are not aware of any other system of laws, which does not provide for some kind of notice of such application, or at all events, for a reference to a clerk, auditor or master, to ascertain if the proposed sale will be advantageous to the estate, or for the benefit of the infant.

It is true that security is usually given by the person applying for such order to sell; but it is seldom that an opportunity is given to the parties interested to enquire into the sufficiency of the security, and it cannot be expected of the court to possess sufficient information for the purpose; and after all the pains that may be taken to provide competent sureties, no personal security whatever can be equal in certainty to the land itself; and supposing the money to be faithfully paid over to the persons entitled, it must bear the deduction of the commissions of the executor, administrator or guardian and the costs and expenses of the sale.

We wish it to be understood that, in suggesting certain provisions in this and other sections of the present bill, by which some restraint may, in practice, be imposed upon the conversion of the land of a decedent or infant into money, we are actuated by no particular or earnest preference of the former over the latter. We are sensible of the justice and expediency of those laws, by which the code of Pennsylvania has been distinguished from the earliest times and which have demolished all the fetters, which the feudal system had forged, for preventing the alienation of real estate, and its liability for debts, and it will be equally our pleasure and duty in the succeeding stages of our commission, to suggest such additions and amendments of those laws, as may most effectually carry out the policy and intentions of the legislature. But so far as respects that portion of the community who are incompetent, either by want of age or of intellect, or in consequence of marriage, to protect their own interests, we conceive that the change from land to money is not desirable, nor within the policy of the legislature. We need not insist upon the fugitive and uncertain locality of money, which may be removed by guardians or other trustees to

remote quarters of the world, while land, the most certain reliance for the support of infants and others, as well as the true strength and solid capital of a country, remains unchangeable and immoveable. This consideration doubtless weighed with the legislature, when, in providing a system for the descent and government of real estate which gave unlimited authority to persons of full age and sound mind and discretion to dispose of their real property by deed or will, they carefully abstained from conferring upon executors, administrators or guardians any power to dispose of real estate except by the authority of the Orphans' Courts. The policy of the law therefore, we take to be, to preserve for minors and persons under disabilities, their real estate, until the time when they may be able to dispose of it with suitable discretion and judgment; and so far as the duties assigned to us may authorise it, we are anxious to sustain this system, believing, as we do, that the first object with the legislature is to protect those who are unable to protect themselves; and that the policy of rendering real estate of more easy fusion and transmission, however important, is of subordinate moment.

Section XXXVII. This section is copied, with some slight verbal alterations, from the first section of the act of the 1st April, 1811. (*Purdon* 188.)

XXXVIII. In this, and the ten succeeding sections, we have collected all the provisions relating to the subject of partition, under the authority of the Orphans' Court, which are scattered over various pages of the statute book; and we have endeavoured to consolidate and arrange them in order, without the sacrifice of any material expressions.

The 22d section of the act of the 19th of April, 1794, (*Purdon* 378,) forms the basis of this section, with the following alterations. For the word "*lands*" in the original we have substituted the term "*real estate*," which is of more comprehensive meaning, and therefore more suitable in a provision, the object of which is a division of all the real property of a decedent. It is proper, also, to state that we have made the same alterations in most other passages of this bill, in which it was necessary to speak of real estate.

In this section, we have also substituted, the terms '*lineal descendants*" for "*children*," in describing the persons, among whom partition is to be made, upon the same principle that the change first mentioned has been suggested, viz: that all who are in the same situation, as to inconvenience, should be entitled to the same remedy. It is true that the Supreme Court has decided, in the case of Hersha *v.* Brenneman, (6 *Sergeant*, & *Rawle* 2,) that *grand children* are included in the term *children*, in the act of 1794; but we consider it to be most prudent, in a revision of laws to introduce terms, respecting which there can be as little room for doubt as language will permit.

We have omitted the term "*next friend*," in this and other parts of the bill, and required that notice should be given to the *guardian*, and that the infant should also appear by *guardian*. The

reasons which have governed us in making this suggestion will be stated in our remarks on section LV.

Section XXXIX. This section provides for the case, where the estate cannot be conveniently divided, and is copied from the 22d section, of the act of 19th April, 1794, (*Purdon* 378,) with some alterations of phraseology and arrangement. It will be seen that we have arranged the descendants into classes for the sake of perspicuity. No change, however, has been made in the substance of the section in this respect. We have introduced the word *recognisance* into the latter clause of this section, that being the kind of security which is most usually taken, and it appears to us most proper to be taken; although we have not felt ourselves authorised, to limit the authority of the court to this mode. We have also required that the appraised value should be payable *with interest*; this being, we believe the usual course, and we suppose the intention of the framers of the act of 1794.

Section XL. This section provides for the case where partition *can* conveniently be made; but the value of the shares cannot be equal. It is not expressly provided for in the present law; and it appears to us proper to introduce here a legislative direction for the subject; especially as a similar enactment has been adopted in the case of partition in the common law courts. The particular provisions of this section are conformable with the general enactments of the law.

Section XLI. In this section we have provided for the case of a partition of the estate into fewer parts than there are heirs. The substance of the provision is to be found in the 22d section of the act of 19th April, 1794; (*Purdon* 379,) the phraseology and form of the section, only being changed.

Section XLII. This section is derived from the 8th section of the act of 7th April 1807. (*Purdon* 385.) We have made the provision general, applying it to all cases of appraisement or partition, mentioned in the preceding sections, and have omitted some superfluous phrases contained in the act of 1807.

Section XLIII. In this section, we have consolidated the provisions existing in the 22d section of the act of 19th April, 1794, (*Purdon* 379,) and in the 6th section of the act of 7th April, 1807, (*Purdon* 384,) with some slight alterations of phraseology, to adapt it to the preceding sections.

Section XLIV. This section contains the provisions to be found in the first section of the act of 2d April, 1804, (*Purdon* 383) and in the 2d section of the act of 26th March, 1808, (*Purdon* 385,) with the following addition. The first named act, provides that the rule upon the heirs, to show cause why the estate should not be sold, should be returnable, on the first day of the next regular session of the court. It appears to us that this notice may in some cases be insufficient, inasmuch as the return of the inquest, or of the seven men may be made to a late period of the preceding term, and the place of residence of the heirs may be at a considerable distance from the seat of the court. We propose, therefore, to au-

thorise the court to make such rule returnable at the next regular session of the court, "or at such subsequent period, as the court, having regard to the circumstances of the case, may direct."

Section XLV. This section is copied from the fifth section of the act of 14th April, 1828, (*Pamphlet Laws*, 484,) with the omission of some redundant phrases.

Section XLVI. In this section are contained the provisions enacted in the first section of the act of April 1st, 1805. (*Purdon*, 383.) We have introduced a clause providing for a case, which may sometimes occur, of there being no "principal mansion" on the land; and have proposed, in such case, to authorise the Orphans' Court of the county in which the greater part of the land lies, to proceed to partition.

Section XLVII. The ninth section of the act of 7th April 1807, (*Purdon*, 385.) contains the principal provisions of the section. We have extended the provision restraining the right of preference to other cases of partition besides the single one mentioned in the act of 1807; as they appeared to us to depend upon the same principle.

Section XLVIII. The substance of the first paragraph of this section is to be found in the eighth section of the act of 4th April, 1797, (*Purdon*, 381,) with this variation, that instead of limiting the benefit of the provision to brothers and sisters of the decedent, we have proposed to extend it to all collateral relations, in whom the estate shall vest in possession. The proviso is entirely new. It was intended to reach a case of not unfrequent occurrence, in which an intestate leaves a widow and father or mother, but no children; in which event, by the existing law of distributions, one moiety of the estate goes to the widow for life, and the other moiety to the father or mother for life, with remainder in fee to the children or other heirs of the father or mother. It appears to us to be right, under such circumstances, that the persons in whom the remainder vests should be made parties to the proceedings in partition, or have the privilege of accepting or refusing the estate at the valuation. In the case of Young v. Bickel, (*1st Serg. & Rawle*, 467,) it was doubted by the Supreme Court, whether the Orphans' Court has power to make partition where an intestate left a widow, a father, a brother and sister, but no children; and it seems to have been the opinion of the court that if the partition were valid under existing law, it would bind the interest of the reversioners. If this be the result, it will be most consonant with justice, as well as convenience, that they should have an opportunity of being heard, and of taking part in the proceeding.

Section XLIX. In this section we have endeavoured to provide for a case, the hardships of which are believed to be peculiar to our laws; since we are not aware of a code or system in which a similar defect appears. Many of our most distinguished judges have long since acknowledged and lamented that there did not exist in the courts of this state any power to interfere on behalf of

a wife, whose real property was converted into money, by a sale under an order of the Orphans' Court; and they have been compelled to witness, without being able to prevent, the payment of the whole fund to the husband often against the wishes of the wife, to the impoverishment of herself and children, and in opposition to the true interests of the husband. The late very eminent chief justice Tilghman, while delivering the opinion of the court, in a case (Yohe *v.* Barnet, 1 *Binney* 358,) in which it was decided that a debt due by a husband to his wife's father might be deducted from the wife's share of the estate, remarked—"There certainly may be hardships in cases of this kind, which probably the legislature were not aware of when they directed the mode of partition. But we must take the law as we find it written."....."It is to be regretted that the courts of this state are not vested with the power exercised by the Court of Chancery of England, of insisting on some provision for the wife, when the husband applies to them for the purpose of getting possession of her personal property. But we have no trace of any such exercise of power by our courts."

The late judge Duncan, in another case, (Stoolfoos *v.* Jenkins, 8 *Sergt. & Rawle* 172,) expressed himself thus: "When so great a change was made in the course of descents, as was effected by the act of 1705, and so novel a course of proceeding introduced, by a tribunal unknown to the common law, it could scarcely be expected from human wisdom to foresee and provide for all the consequences of this transition of real into personal estate. Each day brings up new cases, unfolds new difficulties, discovers new defects; to remedy which the legislature alone are equal. For, with all the laws and supplements made on this important subject, the system continues miserably defective, more especially as it respects the rights of infants and *femes covert*. Hardships do occur, but courts cannot usurp legislative functions, or new model the law, according to their own ideas of natural justice, or redress hardships in each particular instance." &c.

The present chief justice has also expressed his opinion of the unjust operation of the present law, in equally decided terms. "No one," said he (in the case of Ferre *v.* The Commonwealth, 8 *Sergt. & Rawle* 314,) "more highly appreciates the policy and general effect of our intestate laws than I do; yet the frequent transmutation of the real estates of married women into personalty, is one of the oppressive consequences of their operation, and of our want of the specific powers of a Court of Chancery, which every jurist must regret. It was never an object with the legislature to transfer the real estate of the wife to the husband, as if it were personal; for in breaking in on the common law rules of descent, care is taken in other parts of those laws, to prevent the estate from passing to those who are not of the blood of the first purchaser; and those of the half blood are suffered to inherit in preference to the more remote kindred, only where the estate has been acquired by the intestate himself. Had it been foreseen that a contrary re-

sult would be produced by turning a wife's land into money, it would doubtless have been prevented."

Many more testimonies might be quoted to the same effect; but we presume that the opinions of the eminent persons, which we have cited, will be sufficient to satisfy the legislature both of the injurious tendencies of the present law, and of the expediency of some alterations by which the rights and interests of married women may be protected.

In what manner this may be best effected is a question of more difficulty; since, in securing the estate of the wife, it must not be overlooked that the husband also, has a legal interest in that estate, and a certain due influence, which, perhaps, it ought not to be the policy of the law to diminish or counteract. Upon the best reflection that we have been able to give to the subject we have concluded that a positive direction that the share of the wife shall in all cases be vested and held for her separate use, free from the control, debts, and engagements of her husband, would be inadvisable, as respects the domestic interests of the wife, and unjust towards the husband, who would in such cases possess a less degree of control over, and derive less advantage from the property, than if it had continued to be real. A middle course, such as we have recommended in this section, seemed to us, upon the whole, most expedient. This course, besides resembling that which is pursued under similar circumstances by Courts of Equity, has the advantage of analogy with our existing law, respecting the voluntary conveyance of the real estate of femes covert; and thus establishes an uniformity of system, with respect to such estates, which adds to the simplicity of the law, and consequently promotes its general understanding.

Should the provision now suggested receive the approbation of the legislature, we propose in future bills, under the appropriate heads, to suggest such other amendments of the law, as will enable married women to protect their interests, in all other cases, in which their real estate is converted into personal by process or operation of law.

Section L. This section is new, as an express provision of law; but a rule of practice similar to it has prevailed, of late years, in one or more of the Orphans' Courts. We conceive that it should be general, as it is a case of manifest justice and propriety, in respects to those who profess incumbrances upon the interests of heirs in real estate which being converted into money by proceedings in partition, the security of the incumbrance becomes seriously impaired. We have endeavoured in this section to suggest a mode, by which the interests of incumbrances may be protected, where recognizances are given for the purpart of an heir as well as where money is actually paid.

Section LI This section is derived from the first clause, of the 6th section of the act of 14th April, 1828, (*Pamphlet Laws* 484,) with some alterations of phraseology. We have omitted the word *bonds* throughout. Not being a lien on real estate intrinsically,

even when given as security, for the appraised value of real estate in the Orphans' Court, according as we believe to the universal understanding, we do not perceive the necessity for requiring an acknowledgment of satisfaction on the record. When judgment is obtained or confessed on such bonds, the lien partakes of the character of others derived from judgments; and satisfaction may be enforced under the law applying to judgments.

SECTION LII. This section, comprises the remainder of the 6th section of the act of 14th April, 1828, (*Pamphlet Laws* 484,) with some verbal alterations and the omission of the word *bond*, for the reasons stated in the preceding paragraph.

SECTION LIII. The provisions of this section are new. We are not aware that it has ever been judically decided that the lien of a recognisance or other charge, constituted by virtue of proceedings in the Orphans' Court, is divested by a sheriff's sale, or by a sale under process of partition in the common law courts. But the decisions that have taken place, with reference to judgments and mortgages, lead us to suppose that such might be the doctrine, with respect to recognisances; a conclusion we think greatly to be depricated in its effects, however well founded the decisions of the Supreme Court may be in reason and practice. The act of the last session of the legislature on the subject of mortgages, induces us to believe that the suggestion contained in this section will not be unacceptable.

SECTION LIV. This section is also new, as establishing a general rule for notice to heirs, creditors and others interested in proceedings in the Orphans' Court. Having already adverted to the importance of providing some means, by which such persons may have an opportunity, of becoming acquainted with the proceedings of the Orphans' Courts and becoming parties, if they shall think it expedient, we need not repeat our suggestions in this place. Personal notice is undoubtedly the surest; and we have in this section, provided that such notice shall be given, to persons resident within the county, *or within forty miles of the place where the court is holden;* a provision which we think, ought not to be considered burdensome upon the parties, when the importance of the interest generally involved is considered. It is obvious that personal notice must be limited by some measure of distance. In many cases it is impracticable, without a degree of delay and expense, which would frustrate measures of manifest justice, and sometimes impossible from uncertainty, or ignorance of the parties interested. Public notice is all, therefore, that is left; and the only question is, to what extent and in what manner it shall be given. We have endeavoured in this section, to provide for as enlarged notice, as is consistent with a reasonable economy, and a just consideration for others. In directing that notice shall be given in certain cases, by publication in newspapers published in the county, or an adjacent one, and in other cases by publication in the city of Philadelphia, we have followed in the footsteps of previous laws. The direction for publication, however, in at least one newspaper at

Harrisburg, is new; but, we submit, that if adopted it is calculated to produce advantageous results. In most counties there is a newspaper published, under the authority of the government, in which the laws or ordinances are promulgated, and judicial advertisements or others concerning public interests appear. This convenient practice is pursued by the government of the United States, and by most of the state governments. In this state, however, no newspaper exists with such authorative designation. In reporting, hereafter, a bill providing for the printing and promulgation of the laws, we shall probably take occasion to submit to the legislature, our views of the advantages to the public that would arise, if a similar provision existed in this state. In the mean time, however, it appears to us that facilities would be afforded, for the diffusion of notice by the direction for a publication in a newspaper at the seat of government, even should the legislature decline to authorise the designation of an official journal. These facilities would arise, from the central position and character of the seat of government, and from its being the place of resort of members of the legislature, and other persons, from every county in the state. The advantages of the publication would certainly be increased, in a very great degree by legislative authority, to the governor, or secretary of the commonwealth, annually to designate some newspaper at Harrisburg, in which all such judical notices should be published.

Section LV. We have endeavoured in this section to provide a remedy for an evil that may happen, and we believe has happened, under the existing law and practice of the Orphans' Court, namely, the transaction of proceedings affecting the interests of minors, without sufficient notice to persons competent to attend on their behalf. We consider it highly important, in reference to the question of the conclusiveness of decrees of the Orphans' Court, that every means should be taken to enable minors to defend their interests in this court; and we propose, therefore, to require that in every case notice shall be given to the guardian of a minor, if resident within the county or within forty miles of the seat of justice, and that if be there no guardian, notice shall be served on the minor, if above the age of fourteen or his next of kin if the minor be under that age; and if application be not made on the part of the minor for the appointment of a guardian, the court shall appoint a suitable person to attend to his interests. It is believed that these provisions will have the effect of increasing the security of infants, without occasioning any great or very inconvenient delay.

We have in this and other parts of the bill omitted the designation of "*next friend*," because the individual is uncertain and irresponsible, and we think that convenience and the interests of the minor will be promoted by substituting in all cases the guardian, a known officer, who gives security for the faithful performance of his trust, and is responsible in law for acts of neglect as well as for misconduct.

Section LVI. The provisions of this section are also new so far as they are general; but they are to be found already in most of the acts, which provide for the sale of real estate. It appears to us to be more convenient to make a general provision of this nature than to repeat the directions in each case.

Section LVII. This section is new, as a positive enactment; and has been introduced for the purpose of settling a question, about which some doubt has existed, although the general opinion seems to be that the Orphans' Court has always possessed the power mentioned in this section.

Section LVIII. The provisions of this section are new, so far as respects the Orphans' Court, and as we respectfully submit, very important for the ends of justice. A full statement of the motives and considerations by which we have been governed in suggesting them to the legislature, would extend this report greatly beyond what would be desirable; and the same remark may be made of several other sections introduced into these bills. We have already expressed our views of the constitution and character of the Orphans' Court. A tribunal which is intended to operate so extensively, and to secure such important interests, necessarily requires commensurate powers to render it useful to the community; and with the jurisdiction of a Court of Equity, ought to possess its functions and process. One of the most important powers of the Courts of Chancery is that, which, by means of a bill of discovery, they exercise, to reach, as far as human means go, the conscience of a party. The answer to a bill of discovery, like other answers in chancery, is required to be on oath or affirmation; and thus, transactions material to the interests of others are developed, which otherwise would be concealed in obscurity. It has often been regretted that the Court of Common Law did not possess similar powers. In some of the states of this Union they have conferred on those tribunals very extensive authority in this respect, and in other quarters where a revision of the law is taking place, we find that a mode of proceeding is proposed, similar to that which we have suggested in this section. We have not recommended the formal proceeding by bill, a petition, and answer, because we conceive that it had better be left to the court to regulate this as a matter of practice. The mode of examination may either be by petition and answer on oath, which should be filed among the records of the court; or by interrogations, to be administered in the court, or before auditors and to be answered in writing, and also filed of record. The power of examining accountants on oath or affirmation, touching the subject matter of their account, and of compelling the production of books, papers and documents, has already been given to auditors appointed by the Court of Common Pleas, under the act of the 14th April, 1828, *(Pamphlet laws*, 435,) relating to the accounts of assignees; and we believe the authority to have been found very benefical in its exercise. If there be any case in which the means of applying to the conscience of a party are desirable, it appears to us to be that of the settlement of accounts, where the power of ascertaining

by extrinsic evidence whether an accountant has charged himself with all the trust moneys or effects received by him is necessarily very much limited. It has been the prevalent opinion that neither the auditors appointed by the Orphans' Court, nor the court itself, possessed the power to compel an executor or other accountant to produce his books and papers. The authority, now proposed to be given, is confined to the court; who may, however, compel the accountant to produce them before auditors. It may be proper to add that the several Courts of Common Pleas already possess a similar authority, in respect to suits depending before them, by virtue of an act passed on the 27th of February, 1798. (*Purdon*, 402.)

Section LIX. This section relates to the process of the Orphans' Court. It it in a great measure new to our acts of Assembly, and in some respects different from the practice, which has hitherto prevailed. We have found it a subject of very considerable difficulty; but if we rightly interpret the resolutions under which we act, it is one which it was not compatible with our duties to omit. Indeed, we suppose that there is no branch of the subject of the present bill more vague or defective, than this; nor one to which the clause requiring us to suggest such new provisions as may be necessary and expedient, more distinctly applies. We have accordingly given the subject our most serious consideration, and have devoted to it a large proportion of our time. The objects which we have had in view are to provide a speedy method for the settlement of accounts, and for the adjustment of other controversies, within the jurisdiction of the court, and at the same time to prevent injury to the absent, to protect trust property during a dispute, and to provide as far as may be the means of obtaining specific redress. To attain these objects the section provides in substance, that on the petition of any person interested, setting forth a sufficient cause of complaint, and verified by oath or affirmation, the court, or a judge, in vacation, may award a citation to the person, against whom redress is sought, returnable in not less than ten days. We have used the expressions *immediate or remote*, in reference to the interest of the petitioner, because it has been maintained in the Supreme Court that the Orphans' Court has no power to compel an executor to give security, at the instance of one who has a right to the interest of a bequest, but no right to the principle until a future day; (case of Johnson's appeal, 12 *Serg. and Rawle*, 317;) and it seems to us proper to provide for this defect in the present law if it actually exists. We have also in this clause authorised the issuing of a citation, on application to a single judge, in vacation. According to the course of the Orphans' Court, citations issue only on the allowance of the court. The result of this principle—for it is more than a mere rule of practice—is delay in the commencement and progress of its proceedings. In the common Law Courts, writs for the institution of suits issue of course, on the precept of the party or his attorney, although supposed as the *test* indicates, to have issued in

the preceding term. The provision now proposed to be introduced into the Orphans' Court, is an approximation to that practice. No inconvenience can be expected to arise from it, since the affidavit of the petitioner and the supervision of a judge will furnish a sufficient check upon groundless or frivolous complaints.

The citation may be served by the party or his authorised agent; or, if the party require it, by the sheriff or coroner of the proper county. It has been usual, we believe, for the party or his agent, to serve a citation out of the Orphans' Court, and we are not aware of any objections to the practice that are not counterbalanced by advantages. It is obvious, however, that occasions may arise to render the agency of the sheriff, highly desirable, and indeed necessary. In the execution of process, affecting the persons or property of parties, resort must be had either to known officers, or to persons specially appointed for the purpose by the court. We have preferred the former in all cases, for the reason that the execution of responsible duties, should be entrusted only where there is a safeguard of official security.

The manner of service is the subject of the next provision; and in this we have endeavoured to consult as far as may be, the interests of the defendant, and of those who may be responsible for him. The section accordingly, proposes that the citation shall be served on the defendant personally, or by leaving a copy at his last place of abode, with a member of his family. If the defendant be not found, and have no known place of residence, within the county, the citation may be served on his sureties. This last provision is altogether new, but, we submit, a great improvement upon the practice, and a proper addition to the means of notice, which will be found beneficial, both to the complainant and defendant, and a measure of justice towards the sureties themselves. Service, when made by the party, or his agent is to be verified by oath or affirmation; and in all cases the manner of service, is to be specially stated. If service cannot be made within the commonwealth in any of these modes, and the same appear on the return, the court are to award another citation, and make an order for publication thereof, in two or more newspapers, as they may designate; having regard to the supposed residence of the defendant, and other circumstances. The time during which the publication is to be continued, is left to the direction of the court. If the defendant do not appear, at the time appointed by the second citation, the court is authorised to proceed exparte, so far as to refer the contents of the petition to auditors, to report thereon; and if the object be to obtain a settlement of accounts, this also may be reported by the auditor, upon such evidence as may be accessible to him. On the report of the auditor, the court may proceed to make a decree, according to justice and equity; but the decree is subject to their own revision, which must take place on the appearance of the defendant, within the time afterwards limited; and the power will doubtless be exercised with the utmost liberality, wherever it is made to appear that notice has not actually reached a defendant.

A decree or judgment of the court may thus be obtained in all cases, both where the defendant appears, and where he fails to appear after due notice. The decrees of the court may be enforced by attachment, sequestration or execution, in the nature of a writ of *fieri facias.* The two former supply the means of compelling the defendant, to act where his personal agency is essential. The proceedings on the writ of sequestration, which by our old act of 1713, (*Purdon* 612, 13.) was borrowed from the Court of Chancery, being somewhat unsettled and complicated, we have given a form for the writ, containing sufficient directions to the officer; and we have endeavoured in some respects, to simplify the practice under it. It has often been regretted that the Courts of Chancery of England, and some of these states, possessed no process, by which their decrees for the payment of money, could be enforced directly upon the goods and chattels of the defendant, by a levy and sale, in the manner of a *fieri facias.* We have remedied this defect in the practice of the Orphans' Court, by directing that where the decree is for the payment of money, it may be enforced by an execution in the nature of a writ of *fieri facias*, under which the like proceedings may take place, as are had and allowed by virtue of such writs in the Courts of Common Pleas. All these writs, whether of attachment, sequestration, or fieri facias, must be directed to, and executed by the sheriff or coroner of the proper county. These provisions form a system; and might be reported without more. But we have considered it our duty, to provide a different mode of proceeding, in cases requiring more energetic and effectual process. When the person against whom complaint is made, has absconded or is about to abscond, to the prejudice of the complainant, the court or a judge in vacation, is authorised on satisfactory proof of the fact, to issue an attachment or sequestration, or both; the operation of which may be dissolved, on giving security to answer the petition, and abide the orders and decrees of the court. This is, in effect, a holding to bail.

In furtherance of the intent of these provisions the court is authorised at the time of the petition, or at any subsequent stage of the proceeding, on proof that the defendant is wasting or otherwise disposing of the trust property, or is about to remove it beyond the jurisdiction of the court, to issue a writ, authorising the sheriff to take and secure such property; to abide the order of the court. The proceedings as to the execution of this writ will be similar to those in the first stage of a foreign attachment. We have endeavoured to provide against any possible abuse of this writ, by directing that the party in whose favor the writ may issue, shall, if required, give security to the sheriff to indemnify him in the execution of it, and that the party against whom it may issue, shall have the right to stay its execution, by giving security, that the property shall be forthcoming at its return. With these guards, we respectfully submit that a remedy of the nature proposed will be found eminently beneficial. Instances have occurred of gross imposition and injustice, which the Orphans' Courts, with their ex-

isting means, have been unable to redress. Executors and administrators have converted, the trust effects into money, and withdrawn themselves out of the jurisdiction of the court, to the prejudice of their sureties, or of persons interested in the estate, while the Orphans' Court was waiting for the return to a citation; and on the return, if the party had not availed himself of the necessary interval, to withdraw beyond the reach of process, the court could only issue an attachment, and had and still has no means of securing the property itself. The writ now suggested, will provide for this case at least. It is intended, also to give effect to an order of the court, for the delivery of trust property or effects, by a superseded executor, administrator, or guardian, to his successor in office, or to some one who may be appointed by the court to receive them.

We have incidentally mentioned that provision is made for allowing persons against whom any decree has been made in their absence to come in and make defence within a certain time. This period is limited to five years from the entry of the decree; with this qualification that if the party obtaining the decree will give the defendant personal notice of it, the decree shall not be re-examined by the same court, after one year elapsed from such notice. These provisions are taken from a British statute *(5. Geo. 2. c. 25.)* passed previously to our revolution, which has been found very beneficial to the suitors in the Court of Chancery, and has been adopted in many of our sister states. Under the clause relating to notice of the decree, it is intended that notice may be given to the party to be affected by it, whether he be within this commonwealth, or elsewhere. In the meantime, however, the party complainant is not to be absolutely delayed in reaping the fruits of his decree. It is provided that the property sequestered may be applied in satisfaction thereof, if the complainant will give security to abide the order of the court, touching the restitution thereof, in case the defendant shall appear and defend the suit.

If the defendant should not appear within the prescribed period the court may then make a final decree; and any security which may have been given for restitution becomes discharged; or if the decree remains unsatisfied the court may authorise a sale, or the application of the proceeds of any sale which may have been had in the course of the proceeding, in execution of the decree.

In the final clause of this section we have inserted a provision authorising the Orphans' Court which has jurisdiction over the accounts of an executor. administrator, collector or guardian, to send citations and other process into any county of this commonwealth into which such accountant may have removed or where he may be or may possess property amenable to its process. This provision is intended for the single case of original liability to the jurisdiction of the court; and cannot be extended further.

Section LX. This section relates to the practice of the court. It authorises them to fix the return days of their process, and

adopt such rules as may be convenient and necessary to carry into effect the provisions of this act.

SECTION LXI. This, the last section of the bill, relates to appeals to the Supreme Court. The only material points in this section are first, the provision extending the right of appeal to the term of three years. At present there is a limitation of one year to appeals from decrees on the *accounts* of guardians, executors and administrators. We are not aware of any limitation of the period in any other case. Having already submitted our reasons for thinking that it would be proper and just to enlarge the period in the case of the settlement of accounts, providing the decrees of the court be made conclusive in other respects, we will only add that it appears to us that there ought to be a limitation provided in all cases, and that the period we have named is sufficient for the purpose.

The only other point to be noticed in this section is the provision that the reversal or modification of any decree or proceedings of the Orphans' Court for the sale of real estate shall not have the effect of divesting any estate or interest acquired under such decrees, by persons not party thereto. This provision is analogous to that which already exists in our law, in relation to purchasers under sheriff's sales, by virtue of process from the Common Law Courts; and appears to us to be absolutely necessary to insure the obtaining of the fair value of property sold under proceedings in the Orphans' Courts.

SECTION LXII. Certain duties being required of sheriffs by this bill, which are not specifically provided for in the existing fee bill, we have in this section made provision for them.